TRANSCRIPT

OF

RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 223

MERCHANTS MUTUAL AUTOMOBILE LIABILITY INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

ABRAM B. SHART

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

FILED NOVEMBER 16, 1931

... of ... -
Coron assumed. Sound pub - Execution returned
unsatisfied - Can presumption survive -
Deff' Desc - Should be back 2900 v income
100 per week - Presumption contradicted by facts.
Pub 11th way in an act - on a pub - This is a
summary pub against surety.

(29,961)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 11, 1924

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[fol. 1a] **IN SUPREME COURT OF NEW YORK**

At a Term of the Appellate Division of the Supreme Court held in and for the Second Judicial Department, at the Borough of Brooklyn, on the 18th day of May, 1923.

Present:

Hon. William J Kelly, Presiding Justice:
" Adelbert P. Rich,
" Walter H. Jaycox,
" David F. Manning,
" Isaac M. Kapper,
Justices.

ABRAM B. SMART, Respondent,

against

MERCHANTS MUTUAL AUTOMOBILE LIABILITY INSURANCE COMPANY, Appellant

ORDER RESETTLING JUDGMENT

Upon reading and filing the annexed Notice of Motion for resettlement and upon the order heretofore entered herein in the office of the Clerk of this Court on March 16, 1923, and upon the record on appeal filed herein in the office of the Clerk of this Court, it is

Ordered that the said order heretofore entered herein on March 16th, 1923, be and the same hereby is resettled so as to read as follows:

[Title omitted]

"The above named Merchants Mutual Automobile Liability Insurance Company, the defendant in this action having appealed to the Appellate Division of the Supreme Court from a judgment of [fols. 2a & 3a] the Supreme Court entered in the office of the Clerk of the County of Queens on the 22nd day of August, 1922, and from an order made by said Court entered in said Clerk's office on the 2nd day of August, 1922, directing that judgment be entered in favor of the plaintiff and against the defendant herein, and the said appeal having been argued by Mr. Anthony J. Ernest of Counsel for the appellant and by Mr. Theodore H. Lord of Counsel for the respondent, and due deliberation having been had thereon,

It is ordered and adjudged that the judgment and order so appealed from be and the same are hereby unanimously affirmed, and that the respondent recover of the appellant the costs of this appeal.

Enter.

William J. Kelly, Presiding Justice."

Enter. William J. Kelly, P. J.

[fol. 4a] IN SUPREME COURT, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

Clerk's Office, Borough of Brooklyn, N. Y.

I, John B. Byrne, Clerk of the Appellate Division of the Supreme Court in the Second Judicial Department, do hereby certify that the foregoing is a copy of the order made by said court upon the Appeal in the above entitled action, and entered in my office on the 18th day of May, 1923.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at the Borough of Brooklyn, this 14th day of November, 1923.

John B. Byrne, Clerk. (Seal of Supreme Court, Appellate Division, Second Department.)

[fol. 5a] IN SUPREME COURT OF NEW YORK

[Title omitted]

JUDGMENT—Filed March 16, 1923

The above named Merchants Mutual Automobile Liability Insurance Company, the defendant in this action, having appealed to the Appellate Division of the Supreme Court from a judgment of the Supreme Court entered in the office of the Clerk of the County of Queens the 22nd day of August, 1922, and from an order made by said Court denying a motion for a new trial therein, and the said appeal having been argued by Mr. Anthony J. Ernest, of Counsel for the appellant, and by Mr. Theodore H. Lord, of Counsel for the respondent, and due deliberation having been had thereon,

It is Ordered and Adjudged that the judgment and order so appealed from be and the same are hereby affirmed, unanimously and that the respondent recover of the appellant the cost of this appeal.

Enter.

William J. Kelly, Presiding Justice.

[fol. 6a] IN SUPREME COURT, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

Clerk's Office, Borough of Brooklyn, N. Y.

I, John B. Byrne, Clerk of the Appellate Division of the Supreme Court in the Second Judicial Department, do hereby certify that the foregoing is a copy of the order made by said court upon the Appeal in the above entitled action, and entered in my office on the 16th day of March, 1923, and that the original case upon which said appeal was heard are hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at the Borough of Brooklyn, this 14th day of November, 1923.

John B. Byrne, Clerk. (Seal of Supreme Court, Appellate Division, Second Department.)

Supreme Court

1

APPELLATE DIVISION—SECOND DEPARTMENT.

ABRAM B. SMART,
Plaintiff-Respondent,

against

MERCHANTS MUTUAL AUTOMOBILE LIABILITY INSURANCE COMPANY,
Defendant-Appellant.

2

Statement Under Rule 234.

This action was commenced by the service of the summons and complaint on May 9, 1922, and issue joined by service of defendant's answer on June 19, 1922. An application was made at the Special Term for Queens County for an order to strike out the answer under Rule 113 of the Rules of Civil Practice, and for judgment for plaintiff for the relief demanded in the complaint. The motion was granted and the order made on August 1, 1922. Thereafter and on August 22, 1922, judgment in favor of the plaintiff and against the defendant in the sum of $5,597.50 was entered in the office of the Clerk of Queens County.

3

The Appellate Division by its order of March 16, 1923, affirmed the judgment and order appealed from. Judgment for $71.46 costs was entered in the office of the Clerk of the County of Queens on March 22, 1923.

Notice of Appeal to the Court of Appeals dated March 22, 1923, was filed in the office of the Clerk of the County of Queens, March 27th, 1923, and served upon the attorney for the plaintiff March 28th, 1923. Claude J. Banigan, Esq., appears as attorney for plaintiff and Owen B. Augspurger, Esq., as attorney for defendant. There has been no change of parties or attorneys.

4 **Notice of Appeal to Appellate Division.**

SUPREME COURT,

QUEENS COUNTY.

ABRAM B. SMART,
Plaintiff-Respondent,

against

5 MERCHANTS MUTUAL AUTOMOBILE LIABILITY INSURANCE COMPANY,
Defendant-Appellant.

PLEASE TAKE NOTICE that the above-named defendant hereby appeals to the Supreme Court, Appellate Division, Second Department, from the judgment entered in this action on the 22d day of August, 1922, in the office of the Clerk of the County of Queens, for $5,597.50 in favor of the above
6 named plaintiff and against the above-named defendant; and

PLEASE TAKE FURTHER NOTICE that the defendant above-named hereby appeals to the Supreme Court, Appellate Division, Second Department, from the order heretofore entered herein in the office of the Clerk of Queens County on or about the 2d day of August, 1922, directing that judgment be entered in favor of the above-named plaintiff and against the above-named defendant,

Notice of Appeal to Appellate Division.

and the said defendant appeals from each and every part of the said order and judgment.

Dated, August 26, 1922.

Yours, etc.,

OWEN B. AUGSPURGER,
Attorney for Defendant-Appellant,
Office & P. O. Address,
802 Niagara Life Building,
Franklin and Mohawk Streets,
Buffalo, New York.

To:

CLAUDE J. BANIGAN, Esq.,
Attorney for Plaintiff-Respondent,
200 Broadway,
Borough of Manhattan,
City of New York,

CLERK OF THE COUNTY OF QUEENS.

10 **Order Appealed From.**

At a Special Term, Part I, of the Supreme Court, held in and for the County of Kings, in the Second Judicial Department, at the County Court House, in the Borough of Brooklyn, City of New York, on the 1st day of August, 1922.

Present: HON. JAMES C. CROPSEY, Justice.

ABRAM B. SMART,

11 Plaintiff,

against

MERCHANTS MUTUAL AUTOMOBILE LIABILITY INSURANCE COMPANY,

Defendant.

Upon reading and filing the affidavit of Claude J. Banigan, verified the 5th day of June, 1922, the notice of motion dated July 5th, 1922, the
12 pleadings herein and upon the judgment roll and the action of Abram B. Smart against Frank Coron, in the Supreme Court, Queens County, and upon the record on appeal in the Appellate Division, Second Department, therein and upon the testimony of Frank Coron given in supplementary proceedings therein and filed in the Nassau County Clerk's Office on the 28th day of July, 1921, in support of this motion, and the affidavit of George B. Hanavan, verified the 24th day of July, 1922, in opposition thereto, and having heard James G. Purdy, Esq., of counsel for the plaintiff, in support of this motion and counsel for the defendant

13

in opposition thereto and due deliberation having been had, now on motion of Claude J. Banigan, attorney for plaintiff, it is

ORDERED that the answer of the defendant be and the same is stricken out pursuant to Rule 113 of the Rules of Practice and that judgment in favor of the plaintiff for the relief demanded in the complaint be and the same hereby is granted with costs and $10.00 costs of motion.

14

Enter in Queens County,

J. C. CROPSEY,
J. S. C.

Granted, August 1, 1922.

WILLIAM W. KELLY,
Clerk.

15

16 **Judgment Appealed From.**

SUPREME COURT,

QUEENS COUNTY.

ABRAM B. SMART,
Plaintiff,

against

MERCHANTS MUTUAL AUTOMOBILE LIABILITY INSURANCE
17 COMPANY,
Defendant.

An order having been duly made herein bearing date the 1st day of August, 1922, and duly filed in the office of the Clerk of the County of Queens on the 2d day of August, 1922, striking out the answer of the defendant and directing judgment in favor of the plaintiff with costs and $10 costs of motion and the costs of the plaintiff having been duly adjusted at $31.12,

18 Now on motion of Claude J. Banigan, attorney for the plaintiff, it is

ADJUDGED that the plaintiff, Abram B. Smart, recover of the defendant Merchants Mutual Automobile Liability Insurance Company, the sum of $5,566.38, his damages, together with the sum of $31.12, his costs as taxed, in all the sum of $5,597.50, and that he have execution therefor.

Dated, Borough and County of Queens, this 22d day of August, 1922.

EDWARD W. COX,
Clerk.

Complaint. 19

SUPREME COURT,

QUEENS COUNTY.

ABRAM B. SMART,
Plaintiff,

against

MERCHANTS MUTUAL AUTOMOBILE LIABILITY INSURANCE COMPANY,
Defendant. 20

Plaintiff by Claude J. Bannigan, his attorney, complaining of the defendant, alleges

1. Upon information and belief that the defendant is a corporation organized and existing by virtue of the Insurance Laws of the State of New York, and at the time hereinafter mentioned was duly licensed to do business within the State of New York as an Insurance corporation and authorized and empowered to issue policies of insurance to residents of the State of New York insuring them against loss or damage to any person and for which the person insured is liable. 21

2. Upon information and belief that heretofore and on and prior to the 17th day of November, 1919, one Frank Coron was the owner of a certain automobile truck and at the time aforesaid the said automobile carried the New York License Number 831027, 1919.

3. Upon information and belief that heretofore and prior to the 17th day of November, 1919, the

22 Complaint.

defendant duly issued its policy of insurance to said Frank Coron, a resident of the State of New York, under and by virtue of the terms of which the said defendant agreed to and did insure the said plaintiff from loss or damage to any person resulting from an accident, collision or otherwise being struck or hit by the said automobile truck of the said Frank Coron, and for which the said Frank Coron should be liable.

4. Upon information and belief that the said
23 policy of insurance contained a provision that the said Frank Coron was insured only to the extent of $5000 to any one person, together with interest and costs included in any judgment obtained against the said insured for injuries arising out of any such accident.

5. Upon information and belief that the said policy contained a further provision that the insolvency or bankruptcy of said Frank Coron, the person insured, should not release this defendant from the payment of damages for injuries sustained or loss encountered during the life of such policy, and that in case execution against the said
24 insured be returned unsatisfied in an action brought by any such injured because of such insolvency or bankruptcy, that an action may be obtained by the injured person against the defendant under the terms of the said policy for the amount of the damage in said action not exceeding the amount of the said policy.

6. Upon information and belief that the said policy of insurance was in full force and effect upon the said 17th day of November, 1919.

7. That heretofore and on the said 17th day of November, 1919, the plaintiff was injured by the

said automobile owned and operated by the said Frank Coron within the State of New York, and that the plaintiff brought an action against said Frank Coron in the New York Supreme Court, Queens County, to recover the damages so suffered by the plaintiff by reason thereof, and on the 30th day of March, 1921, a judgment was duly rendered in favor of the plaintiff and against the said Frank Coron therein for $11,205.00 damages and $149.05 costs, and on the said day duly entered in the Office of the Clerk of Queens County.

8. That thereafter and on or about the 5th day of April, 1921, a transcript of said judgment was duly filed and docketed in the Office of the Clerk of the County of Nassau that being the County in which the defendant Frank Coron then resided.

9. That on or about the 4th day of May, 1921, an execution against the property of the said Frank Coron was duly issued out of the Supreme Court, Queens County to the Sheriff of the County of Nassau where the said Frank Coron then resided, and that the said sheriff thereafter returned the said execution wholly unsatisfied because of the insolvency of the said defendant, and the said judgment is wholly unpaid.

10. Upon information and belief, that the said Frank Coron on the said 5th day of April, 1921, was and ever since has been, insolvent.

11. That no part of the said judgment has been paid.

12. That by reason of the aforesaid and the Insurance Law of the State of New York there is now justly due and owing the plaintiff from the defendant the sum of $5000 together with the sum of $149.05 plaintiff's costs as taxed, in all the sum

28 Complaint.

of $5,149.05 with interest thereon from the 30th day of March 1921, no part of which has been paid, although same has been duly demanded.

WHEREFORE plaintiff demands judgment against the defendant for the sum of Five Thousand One Hundred Forty Nine and 5/100 ($5149.05) Dollars, with interest thereon from the 30th day of March, 1921, together with the costs and disbursements of this action.

29 CLAUDE J. BANIGAN,
Attorney for Plaintiff,
200 Broadway,
Borough of Manhattan,
New York City.

State of New York, County of New York, ss.:

Abram B. Smart, being duly sworn, deposes and says: That he is the plaintiff herein; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own
30 knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes the same to be true.

ABRAM B. SMART (Signed).

Sworn to before me this
2d day of May, 1922.

A. Martha Schutte (Signed),
Notary Public Richmond County 905.
Certificate filed in N. Y. Co., 14.
N. Y. County Reg. Office 4070.
Comm. expires March 30th, 1924.

Answer.

SUPREME COURT,

QUEENS COUNTY.

ABRAM B. SMART,
Plaintiff,

against

MERCHANTS MUTUAL AUTOMOBILE LIABILITY INSURANCE COMPANY,
Defendant.

The above-named defendant by Owen B. Augspurger, its attorney, answering the complaint of the plaintiff herein:

FIRST: Upon information and belief, admits allegations contained in paragraphs marked "1" and "2."

SECOND: Upon information and belief, admits allegations contained in paragraphs marked "3," "4," "5," and "6," but in connection therewith offers to and does refer specifically to the terms and provisions of the policy of insurance issued by the defendant and insofar as any of the said terms or provisions differ from the allegations set forth in said paragraphs marked "3," "4," "5" and "6," defendant denies the said allegations and for the true and correct terms of said contract or policy, the defendant refers to the original of the same and asks that the said original be produced upon the trial of this action.

THIRD: Upon information and belief, admits that plaintiff brought an action against said

34 Answer.

Frank Coron in the New York Supreme Court, Queens County, to recover damages suffered by the plaintiff and on the 30th day of March, 1921, a judgment was rendered in favor of the plaintiff and against said Frank Coron therein for Eleven thousand two hundred five dollars ($11,205.00) damages and One hundred forty-nine dollars and five cents ($149.05) costs and on said day duly entered in the office of the Clerk of Queens County.

35 FOURTH: Upon information and belief, denies each and every other allegation contained in paragraph marked "7," not hereinbefore specifically admitted or denied.

FIFTH: Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs marked "9" and "11."

SIXTH: Upon information and belief, denies allegations contained in paragraphs marked "10" and "12."

WHEREFORE, the defendant demands judgment,
36 dismissing the complaint of the plaintiff herein, with costs.

OWEN B. AUGSPURGER,
Attorney for Defendant,
Office & P. O. Address,
802 Niagara Life Bldg.,
Buffalo, N. Y.

State of New York,
County of Erie,
City of Buffalo. } ss.:

Owen B. Augspurger, being duly sworn, deposes and says that he is the Secretary of the Merchants

Mutual Automobile Liability Insurance Company, the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein alleged to be true upon information and belief, and as to those matters, he believes it to be true.

That the sources of deponent's information and grounds of his belief as to the matters set forth in said answer not stated on deponent's knowledge are an inspection of the policy or contract of insurance heretofore issued by defendant and letters and communications received from the Claim Department of the defendant maintained at New York City.

OWEN B. AUGSPURGER.

Sworn to before me this
17th day of June, 1922.

J. LEO KENNEDY,
Commissioner of Deeds,
Buffalo, N. Y.

Notice of Motion.

Read in support of motion.

SUPREME COURT,

QUEENS COUNTY.

ABRAM B. SMART,
Plaintiff,

against

MERCHANTS MUTUAL AUTOMOBILE LIABILITY INSURANCE COMPANY,
Defendant.

(Under C. P. A.)

Sir:

PLEASE TAKE NOTICE that upon the annexed affidavit of Claude J. Banigan, verified the 5th day of July 1922, and upon the pleadings herein and upon the judgment roll in the action of Abram B. Smart vs. Frank Coron in the Supreme Court, Queens County, and the Record on Appeal to the Appellate Division, Second Department therein, and the testimony of one Frank Coron given in supplementary proceedings therein and filed in Nassau County Clerk's office July 28, 1921, a copy of which is hereto affixed, the undersigned will move this Court at a Special Term, Part I thereof, to be held at the Kings County Court House on the 18th day of July, 1922, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard for an order pursuant to Rule 113 of the Rules of Civil Practice, striking out the answer of the defendant upon the ground there is no defense to the action, and directing the entry of judgment

for the relief demanded in the complaint, with the costs of this motion and for such other and further relief as may be just.

Dated, New York, July 5th, 1922.

Yours, etc.,

CLAUDE J. BANIGAN,
Attorney for Plaintiff,
200 Broadway,
Borough of Manhattan,
City of New York.

To

OWEN B. AUGSPURGER, Esq.,
Attorney for Defendant,
802 Niagara Life Bldg.,
Franklin & Mohawk Streets,
Buffalo, N. Y.

46 **Affidavit of Claude J. Banigan.**

Read in support of motion.

SUPREME COURT,

QUEENS COUNTY.

ABRAM B. SMART,
Plaintiff,

against

47 MERCHANTS MUTUAL AUTOMOBILE LIABILITY INSURANCE COMPANY,
Defendant.

State of New York, County of New York, ss.:

Claude J. Banigan, being duly sworn deposes and says: That he is the attorney for the plaintiff in the above entitled action.

That this action is brought pursuant to the provisions of the Insurance Law of the State of New
48 York to recover of the defendant the amount of its policy of insurance issued to Frank Coron insuring him against loss and damage to the extent of $5000.00 and costs as the result of personal injuries sustained by any person or persons through a collision with the automobile of the said Frank Coron described in said policy, all of which more fully appears and is set forth at length in the complaint herein.

The summons and complaint herein were duly served on the defendant on the 9th day of May, 1922, and issue was joined by the service of defendant's answer by mail the 19th day of June, 1922.

In and by said answer the defendant admits

that it is a corporation organized under the Insurance Law of the State of New York, authorized to do business and to issue policies of insurance to residents of the State of New York, and insure them against loss or damage to any person for which the person insured is liable; that on November 17, 1919, one Frank Coron operated a certain automobile truck; that on said day the defendant issued its policy of insurance to the said Frank Coron insuring him to the extent of $5000 for injury to any one person as the result of a collision with said automobile truck; that the said policy contained a provision required by the Insurance Law of the State of New York, to wit: the insolvency or bankruptcy of the person insured, Frank Coron, should not release the defendant from the payment of damages for injuries sustained during the life of the policy, and further that in case execution against the insured should be issued and returned unsatisfied in an action brought by said insured because of such insolvency or bankruptcy an action may be maintained by the injured person against the defendant under the terms of said policy for the amount of damage in said action not exceeding the amount of the policy; and further admits that the said policy of insurance was in full force and effect on the 17th day of November, 1919.

The answer *denies upon information and belief* that the plaintiff was injured on the 17th day of November, 1919, by an automobile owned and operated by the said Frank Coron, but *admits* that the plaintiff brought an action in the Supreme Court, Queens County, against said Coron and recovered a judgment duly entered the 30th day of March, 1921, for $11,205 damages and $149.05 costs. The answer admits that the judgment was

52 Claude J. Banigan.

docketed in Nassau County on April 5, 1921, that being the County in which the said Frank Coron then resided. Then follows the denial of knowledge or information sufficient to form a belief of the allegations of the complaint numbered "9," "10," "11," which in brief allege the issuance of execution to the Sheriff of Nassau County, the return thereof by the Sheriff unsatisfied because of the insolvency of the said Frank Coron, the said judgment is unpaid; and that the said Frank
53 Coron on the 5th day of April, 1921, was and ever since has been insolvent, that no part of the judgment has been paid and denies upon information and belief the allegations of paragraph 2, that there is owing this plaintiff the sum of $5000 with $149.05 costs, and interest.

Deponent verily believes that this answer is a sham and fraud and is put in for the sole purpose of delay and not in good faith. The facts are that the judgment which the defendant admits was obtained against Frank Coron by this plaintiff on March 30, 1921, was in an action brought by this plaintiff to recover from Frank Coron for in-
54 juries sustained by him on the 17th day of November, 1919, as the result of a collision with the automobile truck of said Frank Coron. This appears from the judgment roll in said action. This defendant by its counsel William C. Smith appeared in the said action for Frank Coron or was employed by this defendant for that purpose and tried the case for said Coron. That thereafter this defendant through its said attorney took an appeal from said judgment in the name of the said Coron to the Appellate Division of the Supreme Court, and that the said judgment was there affirmed, one Judge dissenting. That thereafter this defendant has caused an appeal in the name of

55

the said Frank Coron to be taken from the said judgment to the Court of Appeals of the State of New York. Deponent makes the record on appeal herein a part of his application and respectfully refers to the same for details as to the happening of the said accident, and that said accident did occur in the manner claimed by plaintiff was one of the issues decided in plaintiff's favor as a result of the said trial.

No security or undertaking has been given by or on behalf of the said Frank Coron upon the said 56
appeals except that an undertaking for *cost only* was given upon the appeal to the Court of Appeals. No return has been filed upon said appeal.

Deponent on or about the 4th day of May, 1921, caused execution to be duly issued against the property of the said Frank Coron out of the Supreme Court, Queens County, to the Sheriff of the County of Nassau where said Frank Coron then resided and the said Sheriff thereafter duly returned said execution wholly unsatisfied, as appears by the records of the County Clerk of Queens County, and by the Certificate of the Sher- 57
iff of Nassau County hereto annexed and marked Exhibit A.

Thereafter deponent caused an order in supplementary proceedings to be made on the 15th day of July, 1921, upon said judgment, and the said Frank Coron was duly examined thereunder on the 28th day of July, 1921, and upon said examination it was disclosed that on the said 5th day of April, 1921, the said Frank Coron had not sufficient property to pay his debts including this judgment and was insolvent and ever since has been. The testimony taken upon the said examination is filed in the Clerk's office, Nassau Coun-

58 Claude J. Banigan.

ty, and a copy is hereto annexed and marked Exhibit B.

Deponent further says that he has had full charge of this action ever since its inception and that no part of the said judgment has been paid, and that the same is now fully unpaid, and deponent further says that when this defendant says that it has no knowledge or information as to whether the said judgment has been paid it makes a statement which he has full reason to believe is
59 false.

Deponent therefore respectfully asks that an order may be made pursuant to Rule 113 of the Rules of Civil Practice striking out the said answer of the defendant and granting the plaintiff the judgment prayed for in his complaint.

CLAUDE J. BANIGAN.

Sworn to before me this
5th day of July, 1922.

OTTO C. MILLER,
60 Commissioner of Deeds,
City of New York.

Exhibit A.

61

(Annexed to Affidavit of Claude J. Banigan.)

NASSAU COUNTY SHERIFF'S OFFICE

CHARLES W. SMITH, Sheriff

O. Howard Tuthill
Under Sheriff

George A. Greene
Clerk

Mineola, N. Y., June 13, 1921.

I this day returned Execution of Abram B. Smart vs. Frank Coron to Queens County, unsatisfied. 62

CHARLES W. SMITH,
Sheriff, Nassau County.

To:

Claude J. Banigan,
200 Broadway,
New York City.

63

64 **Exhibit B.**

(Annexed to Affidavit of Claude J. Banigan.)

COUNTY COURT,

NASSAU COUNTY.

In the Matter
of
Supplementary Proceedings:
ABRAM B. SMART,
65 Judgment-Creditor,
against
FRANK CORON,
Judgment-Debtor.

Examination of Frank Coron, judgment-debtor, held at the County Court House, Mineola, N. Y., the 28th day of July, 1921, at 10 a. m., pursuant to order of Hon. Lewis J. Smith, County Judge.

Present:
James C. Purdy of counsel for Judgment-Creditor.
66 Frank Coron, Judgment-Debtor.

Frank Coron, being first duly sworn, testified as follows:

I reside at Wantagh, Nassau County, New York, am 52 years of age, and my occupation is that of farmer and truckman, and have been so engaged in business since about 1900.

The accident out of which the judgment herein was the outcome occurred in the fall of 1919.

67

At that time I owned no real estate, my wife, Sarah R. Coron, owned the house we live in, she took title to it about 1907. She has held title to it ever since. At that time I owned three motor trucks. I still own them. Two were 3 ton Alco trucks. The third was a converted touring car licensed as a one-ton truck, also Alco. They were all about 1910 or 1911 manufacture.

I rent about 15 acres of farm land from Norris Corrugated Paper Company of Brooklyn. Land is located at Wantagh. All is planted in corn, 68
feed corn for horses.

I own several plows, harrows, cultivators, etc. They are all of them three or four years old. Some of them are much older. I own one team of horses, each is over ten years of age. I keep them at the place where I live. I have no cows or other livestock.

Mrs. Coron, my wife, owns all the household furniture. This was bought 25 years ago when we were married. It has been several years since I bought any furniture.

I own no real estate. I did own two lots in 1915 at Wantagh, and in that year I gave them to Mrs. 69
Coron. I had bought them two years before. They cost $750. Mrs. Coron paid the last of the purchase price and I deeded them to her.

Mrs. Coron purchased from Ultsch's Estate, a store opposite Ultsch's hotel at Wantagh, L. I. She is to pay $10,000 for it and only $2,000 has been paid. She has not taken title yet. She is purchasing this with her own money.

Two sons live with us. They pay about ten dollars a week in all to my wife for their board. I have been contributing from twenty-five to thirty dollars a week toward the support of the house.

I have a bank account in the First National

Bank at Bellmore. I have on deposit there not over twenty-five or thirty dollars.

I have drawn a few checks for current bills since I have been served with the order for my examination. They do not aggregate over twenty-five or thirty dollars.

Mrs. Coron also has an account in the same bank.

I am doing very little trucking business now. This is an off season. Nearly all the trucking business I do is for farmers.

There are no mortgages on the trucks. In 1911 I paid $1800 for one, about $700 for the other in 1912 and had to repair it, for the small one I paid $400 in 1915 or 1916.

I have a $200 Life Insurance Policy in the John Hancock Life Insurance Co. It was taken out this past spring by my wife and she pays the premium. I have some old farm wagons and trucks, have been standing out doors for upwards of ten years.

I own no mortgages, no bonds, no Liberty bonds. I own no notes. I have only a few dollars owed me. I have no actions pending against anyone.

I have a mechanic's lien for $40 filed against Browning Estate at Wantagh. This was filed this past spring and was for labor done. I have commenced no action to foreclose it. I have no other claims or liens against anybody.

There are no other judgments against me. other actions now pending against me.

I have no income except what I earn. No person holds any property of any kind for me.

I paid no part of the two thousand dollars which Mrs. Coron paid on account of the store property at Wantagh.

Claude J. Banigan—Exhibit B. 73

I own no stock in any corporation, and have no savings bank account.

I own no jewelry, no watch or other articles of personal adornment. I own two suits of clothes.

Two other sons work for me. I pay them ten dollars a week and board. I think I have been earning about $100 a week the past three months. The expenses aggregate about $50 to $60 a week, not including house expenses.

I have made income tax reports to the U. S. Government and my State and have paid no tax 74
for the past year. The preceding year I paid a small tax.

I carried liability insurance at the time of the accident. It was for $5000 for one person $10,000 for one accident.

FRANK CORON.

Sworn to before me this
28th day of July, 1921.

Lewis J. Smith,
County Judge of Nassau County. 75

76 **Affidavit of George B. Hanavan.**

(*Read in opposition to motion for judgment.*)

SUPREME COURT,

QUEENS COUNTY.

ABRAM B. SMART,
Plaintiff,

against

77 MERCHANTS MUTUAL AUTOMOBILE LIABILITY INSURANCE COMPANY,
Defendant.

State of New York, County of New York, ss.:

George B. Hanavan, being duly sworn, says that he is of counsel for the defendant herein.

This action was commenced to recover damages for personal injuries sustained by the plaintiff and
78 alleged to have been caused by the negligence of the defendant, without any negligence of the plaintiff thereunto contributing.

1. The record on appeal in the action by this plaintiff against Frank Coron as defendant, has been duly printed for filing in the Court of Appeals. The record consists of 299 printed pages and some additional matter is to be added. An examination of the record on appeal will show that the plaintiff Abram B. Smart sustained the alleged injuries by standing upon the running board of an automobile driven by one Worthington, along the Merrick Road in Long Island on or about November 17th, 1919. Smart stood upon the

near or left side running board while the automobile was being driven by one Worthington in such a manner that the disinterested witness Miss Edna Walter testified that it "flew along" and it appears that at the time of the accident it was late in the night and it was so dark that Worthington could not see more than about 15 feet ahead. A large number of witnesses say that Smart was struck on the left side of the buttocks when the Worthington vehicle side swiped the truck of Frank Coron. Nobody else in the Worthington automobile was injured except another person named Cornell who was also standing or sitting over the left side running board; and the glass windshield was not broken. The testimony shows that the plaintiff Smart could have set inside the automobile if he desired to do so; but he claimed that it was more comfortable outside on the running board.

The defendant Coron properly proved by a great many witnesses that his truck was loaded with a very heavy load and was proceeding at a moderate pace in control; and that the Worthington automobile struck the Coron truck a sidewise blow squeezing Smart between the sides of the vehicles.

Under these circumstances, the defendant Coron took an appeal to the Appellate Division. Although the majority of the judges voted to affirm, Mr. Justice Kelly dissented upon the authority of *Volosko* vs. *Interurban R. Co.*, 190 N. Y., 206.

2. Section 588 of the Civil Practice Act gives an absolute right to appeal

> "where one or more of the justices of the Appellate Division dissents from the decision of the Court."

82 George B. Hanavan.

Therefore, the defendant Coron duly perfected his appeal to the Court of Appeals by serving his notice of appeal upon the attorney for the plaintiff and an undertaking for $500 for costs to perfect the appeal in the Court of Appeals; and duly filed the said notice of appeal in the office of the Clerk of the County of Queens together with the said undertaking. The defendant Coron has procured the printing of upwards of 300 pages in the record on appeal for submission to the Court of
83 Appeals; and intends in good faith to submit the appeal to the Court of Appeals at the earliest opportunity.

3. A copy of the policy of insurance issued by the defendant insurance company to Frank Coron herein will be submitted as part of this affidavit. Such policy provides, among other things, that the insurance company covenants

> "to *indemnify* the assured against loss from the liability imposed by law"

in certain contingencies; and, while after the re-
84 turn of an execution unsatisfied against the assured "because of * * * insolvency or bankruptcy," then the injured person may maintain an action "under the terms of this policy;" nevertheless the next sentence states

> "The Company does not prejudice by this condition any defences against such action that it may be entitled to make under this policy."

4. The record on appeal shows that Abram B. Smart the plaintiff at the time of sustaining the injuries which he sued for herein, was engaged in the work of assisting in the transportation of cer-

tain furniture and personal property carried in the automobile of one, Reginald R. Worthington of Inwood, Long Island. The said Smart was actually engaged in holding and protecting the said furniture and other property when he was injured.

The evidence in the present record in the Court of Appeals shows very persuasively

(1) That the collision of the vehicles was caused by the acts and omissions of Worthington and that unless Worthington's vehicle had struck the Coron vehicle at or near the rear of the Coron vehicle that the plaintiff Smart could not have been caught between them. These facts indicate that the defendant insurance company will be entitled to recover from the said Worthington any damages which it is compelled to pay to the plaintiff Smart for the reason that the negligence of the said Worthington was the cause of the injuries to Smart. Furthermore the facts in the record show that the said Smart was engaged in a common employment with Worthington in moving the said furniture and that Smart was not a passenger; and that the negligence of Worthington should be imputed to Smart; and should deprive him of recovery against Coron.

The plaintiff Smart upon the evidence in the record has clearly shown that he was guilty of contributory negligence and gave no evidence tending to show any act or effort upon his part to prevent the injury to himself which not only was reasonably to be anticipated but could not conceivably be averted at the time and place involved and under the circumstances. The Worthington automobile was flying along the Merrick Road at night in extreme darkness with Smart standing on the near left hand side running board

88 George B. Hanavan.

with, his buttocks extending out into the pathway of passing automobiles and what was obviously inevitable happened, to wit; he was struck on the left side and thrown off the running board and injured.

5. The assured is required to render all possible aid "in prosecuting appeals" under paragraph E of the policy. The liability provided for under the statute is modified by the provision that the indemnity to third persons shall be
89 enforceable "under the terms of the policy." Inasmuch as the assured must facilitate the prosecuting of appeals it is transparent that third persons claiming against the insurance company by reason of their claim against the assured can not nullify the rights of the insurance company under the contract and policy of insurance nor defeat the obligations of the assured.

The application of Section 109 of the Insurance Law to the contract and policy of insurance issued by the defendant, Merchants Mutual Automobile Liability Insurance Co., to the defendant Frank Coron, and the construction of the said
90 statute and the said contract of insurance so as to enlarge and extend the liability of the said defendant insurance company beyond and greater than the liability of the said insurance company to the defendant Frank Coron impairs the obligation of the said contract in contravention of Article 1, Section 10 of the Constitution of the United States, and deprives the said insurance company of its property without due process of law, and denies to the said insurance company the equal protection of the laws and abridges its privileges and immunities in contravention of the 14th Amendment of the Constitution of the

United States, as more particularly set forth in the United States Judicial Code, Section 237, as amended formerly known as Section 709 of the revised Statutes of the United States. 91

That upon information and belief the defendant Frank Coron has not been adjudged a bankrupt nor has any petition for adjudication in bankruptcy been filed against him.

That upon information and belief the defendant Frank Coron has not been declared insolvent nor has any petition been filed against him for an assignment for the benefit of creditors. 92

That upon information and belief the defendant Frank Coron is not insolvent within the meaning of any law covering insolvency. And that as a matter of fact, the said Frank Coron has received an income of $100 a week for three months preceding July 28, 1921; and it appears that no order for an execution against the income of the said Frank Coron has been made in pursuance of Section 684 of the Civil Practice Act of New York.

That the said Frank Coron is the owner of two automobile trucks for which he paid respectively $1800 and $700 in addition to $400 for repairs, and that there are no mortgages upon the said trucks. 93

That the foregoing facts concerning the solvency and the income and property of the said Frank Coron are set forth in his examination taken in supplementary proceedings by the plaintiff herein, which is made part of the motion papers upon this motion.

For the foregoing reasons, the defendant Insurance Company cannot be denied the right to prosecute its appeal to the Court of Appeals.

94 George B. Hanavan.

And the plaintiff has not shown any facts entitling him to relief under the Statute (Section 109 of the Insurance Law), and has not shown facts warranting the conclusion that the defendant should not be allowed to defend under Rule 113 of the Rule of Practice.

That for all that has been shown by the plaintiff herein, the income and savings of the said Frank Coron since his examination in supplementary proceedings on or about July 28th, 1921, have
95 continued at approximately the same rate, to wit: $100 a week.

WHEREFORE the motion for summary judgment should be denied.

GEORGE B. HANAVAN.

Sworn to before me this
24th day of July, 1922.

ALICE A. ACOSTA,
Notary, Public, New York County No. 1.
96 New York County Register's No. 3047.
Commission expires March 30, 1923.

Stipulation. 97

SUPREME COURT,

APPELLATE DIVISION—SECOND DEPARTMENT.

ABRAM B. SMART,
Plaintiff-Respondent,

against

MERCHANTS MUTUAL AUTOMOBILE LIABILITY INSURANCE COMPANY, 98
Defendant-Appellant.

IT IS STIPULATED that the judgment roll in the action of Abram B. Smart against Frank Coron in the Supreme Court, Queens County and the record on appeal therein to the Appellate Division, Second Department and also the Exhibit "copy of insurance policy" annexed to the affidavit in opposition for defendant need not be printed in this record on appeal herein, but that the printed record in the aforesaid action of Abram B. Smart against Frank Coron and a printed copy of the policy may be produced upon the argument of this appeal for use by either Appellant or Respondent. 99

Dated, October 3, 1922.

CLAUDE J. BANIGAN,
Attorney for Plaintiff-Respondent.

OWEN B. AUGSPURGER,
Attorney for Defendant-Appellant.

100 **Opinion.**

Smart against Merchants Mutual Automobile Liability Insurance Company.

New York Law Journal, July 31, 1922.

OPINION BY CROPSEY, J.

The answer admits all the material allegations save the insolvency of the assured and the fact that the accident to plaintiff was occasioned by the negligent operation of the automobile owned
101 by the assured which was covered by defendant's liability policy. The latter fact is conclusively established by the case on appeal from the judgment obtained against the assured and by the affidavit submitted by defendant upon this motion. As to the insolvency of the assured, there is the official record showing the return of an execution unsatisfied. This is *prima facie* evidence of insolvency within the meaning of that term as used in the policy (*Schoenfeld v. N. J. F. & P. Insurance Co.*, L. J. July 20, 1922, opinion by Cropsey, J.). In addition there is the examination of the
102 assured in supplementary proceedings which establishes the fact, and his insolvency is not really denied by the opposing affidavit. Upon the question of defendant's liability see *Roth v. Nat. Mutual Auto Casualty Co.*, (App. Div., First Department, decided July 14, 1922). Defendant urges that judgment should not be given against it because an appeal to the Court of Appeals is pending from the judgment obtained by the plaintiff against the assured. Defendant's counsel conceded upon the argument that if this case were now on trial that fact would not be a de-

fense. It seems to me the situation is just the same now and that it cannot defeat plaintiff's right to judgment upon these papers, for defendant has no defense. Motion granted, with $10 costs.

Stipulation Waiving Certification

Pursuant to Section 170 of the Civil Practice Act, we hereby stipulate that the foregoing are 104
true copies of the notice of appeal, the order and judgment appealed from, the pleadings, the notice of motion and affidavits and all the papers which were heard in the Court below and the whole thereof, which are now on file in the office of the Clerk of the County of Queens and that certification thereof pursuant to Section 616 be and the same hereby is waived.

Dated, October 9, 1922.

CLAUDE J. BANIGAN 105
Attorney for Plaintiff-Respondent.
OWEN B. AUGSPURGER,
Attorney for Defendant-Appellant.

[fol. 35a] In Supreme Court of New York, Appellate Division

Clerk's Certificate

I, John B. Byrne, Clerk of the Appellate Division of the Supreme Court in the Second Judicial Department, do hereby certify that the foregoing is a copy of the Record on Appeal in the above entitled action, filed and entered in my office on the 16th day of October, 1922, and that the case upon which said appeal was heard is hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at the Borough of Brooklyn, this 14th day of November, 1923.

John B. Byrne, Clerk. (Seal Supreme Court, Appellate Division, Second Department.)

[fol. 36] In Supreme Court, Queens County

Abram B. Smart, Plaintiff,

against

Merchants Mutual Automobile Liability Insurance Company, Defendant

Judgment of Affirmance—Filed March 22, 1923

The defendant having appeal from an order of this Court bearing date the 1st day of August, 1922, striking out the answer of the defendant and directing judgment in favor of the plaintiff, and from the judgment herein in favor of the plaintiff and against the defendant for the sum of $5,597.50 and docketed in the office of the Clerk of the County of Queens on the 22nd day of August, 1922, and the said judgment and order so appealed from having been unanimously affirmed by an order of the Appellate Division of this Court, Second Department bearing date the 16th day of March, 1923, and the plaintiff's costs having been duly adjusted in the sum of $71.46.

Now on motion of Claude J. Banigan, Attorney for the plaintiff, it is

Adjudged that the judgment and order so appealed be, and the same hereby are unanimously affirmed, and it is further

Adjudged that the plaintiff, Abram B. Smart, recover of the Merchants Mutual Automobile Liability Insurance Co., defendant, the sum of $71.46, his costs as taxed, and that he have execution therefor.

Dated, March 22nd, 1923 at 3:30 P. M.

Edward W. Cox, Clerk. (Seal.)

[File endorsement omitted.]

Clerk's certificate to foregoing paper omitted in printing.

[fol. 37] IN SUPREME COURT OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS

And now comes the Merchants Mutual Automobile Liability Insurance Company, Petitioner and Plaintiff in Error by Anthony J. Ernest, its attorney and in connection with its petition for a Writ of Error shows that in the record and proceedings and in the rendering of the judgment and decision of the Supreme Court of the State of New York and of the Court of Appeals of the State of New York in the above entitled cause manifest error has intervened to the prejudice of this petitioner and Plaintiff in Error in this, to wit:

First. That the Supreme Court of the State of New York erred in overruling the objection of the Plaintiff in Error to the granting of summary judgment, especially set up and claimed, that Section 109 of the Insurance Law of New York violated the Constitution of the United States in Article 1, Section 10 thereof, and the 14th Amendment thereto, in that the said statute takes the property of the Plaintiff in Error without due process of law and denies to the Plaintiff in Error the equal protection of the laws in violation of the 14th Amendment to the Constitution of the United States and impairs the obligation of the contract with the Plaintiff in Error, whereby was drawn in question the validity of a statute of or an authority exercised under the State of New York, on the ground of their being repugnant to the Constitution or Laws of the United States and the decision was in favor of their validity; and that the said Court erred in ordering and entering judgment and judgment of affirmance against the Plaintiff in Error against its objection, especially set up and claimed, that Section 109 of the Insurance Law of New York violated the Constitution of the United States in Article 1, Section 10 thereof, and the 14th Amendment thereto, in that the said statute takes the property of the Plaintiff in Error without due process of law and denies to the Plaintiff in Error the equal protection of the laws in violation of the 14th Amendment to the Constitution of the United States and impairs the obligation of the contract with the Plaintiff in Error, whereby was drawn in question the validity of a [fol. 38] statute of or an authority exercised under the State of New York, on the ground of their being repugnant to the Constitution or Laws of the United States and the decision was in favor of their validity.

Second. The Supreme Court of the State of New York erred in holding over the objection of the Defendant in Error, that Section 109 of the Insurance Law of New York compelling the Defendant in Error to include in its policy and contract of insurance the provision of the said statute directing the pyament of the money agreed to be paid to the Assured person thereunder, to the Defendant in Error herein solely by reason of the alleged insolvency or bankruptcy of the

said Assured person, in violation of the provisions of the contract of insurance wherein the Plaintiff in Error agreed to indemnify the Assured person only

"for a loss that Assured has actually sustained by the Assured's payment in money—(a) of a final judgment rendered after a trial in a suit against the Assured; (b) of the expenses (excluding any payment in settlement of a suit or judgment) incurred by the Assured in the defense of a suit against the Assured. The Company does not prejudice by this condition any defenses against such action that it may be entitled to make under this policy"

and by which policy of insurance the Defendant in Error agreed "to indemnify" the Assured person only, and after including the provisions of said Section 109 of the Insurance Law the said policy expressly provided that

"Nothing herein contained shall be held to vary, alter, waive, or extend any of the terms, conditions, agreements, or limitations of said policy other than as above stated."

Third. That the said Court erred in not holding that Section 109 of the Insurance Law of the State of New York was repugnant to and violated the Constitution of the United States in Article 1, Section 10 thereof and the 14th Amendment thereto.

Fourth. That the said Court erred in ordering, entering and affirming the judgments against the plaintiff in error in favor of the defendant in error upon the alleged ground of the insolvency or bankruptcy of one Frank Coron, the insured person to whom the Plaintiff in Error issued its policy of insurance, over the objection of the Plaintiff in Error especially set up and claimed in opposition to the motion for such judgment that Section 109 of the Insurance Law of the State of New York impairs the obligation of the said contract in contravention of Article 1, Section 10 of the Constitution of the United States and deprives the Plaintiff in Error of its property without due process of law and denies to the said Plaintiff in Error the equal protection of the laws, in violation of the 14th Amendment [fol. 39] to the Constitution of the United States whereby was drawn in question the validity of a statute of or an authority exercised under the State of New York, on the ground of their being repugnant to the Constitution or Laws of the United States and the decision was in favor of their validity; and wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity.

Fifth. The Supreme Court of the State of New York erred in holding that as a matter of law the Assured person, Frank Coron, was insolvent or bankrupt.

Sixth. The Supreme Court of the State of New York erred in striking out the answer of the Defendant and in denying a jury trial of any of the issues of fact, and in ordering summary judgment, upon the complaint.

By reason whereof this petitioner and plaintiff in error prays that the said judgment of the Supreme Court of the State of New York may be reversed, etc.

Dated, the 10th day of October, 1923.

Anthony J. Ernest, Attorney for Plaintiff-in-Error.

Office & P. O. Address, No. 29 Broadway, City of New York, New York.

[fol. 39½] Service of the within Assignment of Error is hereby admitted on behalf of Abram B. Smart, the defendant in error this 19th day of October, 1923.

Claude J. Banigan, Theodore H. Lord, Attorney- for Defendant-in-Error.

[fol. 40] In the Supreme Court of the United States

[Title omitted]

Prayer for Reversal

To the Supreme Court of the United States:

Comes now the above named Plaintiff-in-Error, and in connection with its Writ of Error heretofore issued by this Court to the Supreme Court of the State of New York, in the Appellate Division, Second Department thereof, the said Plaintiff-in-Error prays for a reversal of the order of the Supreme Court of the State of New York entered in the Office of the Clerk of the Appellate Division thereof, in the Second Judicial Department of the said State, on the 18th day of May, 1923, affirming a judgment of the said Supreme Court theretofore entered on August 22, 1922, against the Plaintiff-in-Error herein, and for the reversal of the Judgment of Affirmance entered upon the aforesaid Order of Affirmance, in the said Supreme Court of the State of New York, and docketed in the Office of the Clerk of the County of Queens, State of New York, on March 22, 1923, against the Plaintiff-in-Error herein.

And your petitioner will ever pray.

Dated, October 18th, 1923.

Anthony J. Ernest, of Counsel for Merchants Mutual Automobile Liability Insurance Company.

Office and Post Office Address, No. 29 Broadway, Borough of Manhattan, City of New York, New York.

Service of the within Prayer for Reversal is hereby admitted on behalf of Abram B. Smart, the defendant in error this 19th day of October, 1923.

Claude J. Banigan, Attorney for Defendant-in-Error. Theodore H. Lord.

[fol. 40½] [Endorsed:] Supreme Court of the United States Merchants Mutual Automobile Liability Insurance Company, Defendant-in-Error, against Abram B. Smart, Plaintiff-in-Error. Prayer for Reversal. Anthony J. Ernest, Attorney for Defendant-in-Error, 29 Broadway, Borough of Manhattan, New York, N. Y.

[fol. 41] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR WRIT OF ERROR

To the Supreme Court of the United States:

The petition of the plaintiff-in-error, above named, respectfully shows:

1. On or about August 16, 1919, plaintiff-in-error issued to one Frank Coron, a policy of insurance to indemnify the said Frank Coron for loss actually sustained by the payment in money for personal injuries or death caused by the said Frank Coron. (A copy of the said policy of insurance is hereto annexed and made a part hereof).

2. Section 109 of the Insurance Law of New York provided that no policy of insurance for such loss should be issued without containing a provision

"that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy, and stating that in case execution against the insured is returned unsatisfied in an action brought by the injured, or his or her personal representative in case death results from the accident, because of such insolvency or bankruptcy, that then an action may be maintained by the injured person, or his or her personal representative, against such corporation under the terms of the policy for the amount of the [fol. 42] judgment in the said action not exceeding the amount of the policy."

(The said statute is set forth in New York Laws 1917, Chapter 5240, amended by New York Laws 1918, Chapter 182, a copy of which is hereto annexed and made a part hereof.)

3. That the defendant-in-error Abram B. Smart recovered a judgment against the said Frank Coron for about $11,354.05, which was docketed April 5, 1921. in the Office of the Clerk of Nassau County, for personal injuries alleged to have been caused by the negligence of the said Frank Coron.

4. That the defendant-in-error Abram B. Smart alleged that the said judgment was wholly unsatisfied because of the insolvency of the said Frank Coron.

5. That the defendant-in-error Abram B. Smart commenced the instant action in the Supreme Court of the State of New York to recover upon the aforementioned policy of insurance issued to the said Frank Coron, and alleged in the complaint herein, amongst other things,

"12. That by reason of the aforesaid and the Insurance Law of the State of New York there is now justly due and owing the plaintiff from the defendant the sum of $5,000, etc."

6. That under Rule 113 of the Rules of Civil Practice of the State of New York, said Abram B. Smart, the defendant-in-error, moved the Supreme Court of the State of New York for an order

"striking out the answer of the defendant upon the ground that there is no defense to the action, and directing the entry of judgment for the relief demanded in the complaint."

7. That upon the said motion an order was made by the Supreme Court of the State of New York ordering as follows:

[fol. 43] "Ordered that the answer of the defendant be and the same is stricken out pursuant to Rule 113 of the Rules of Practice and that judgment in favor of the plaintiff for the relief demanded in the complaint be and the same is granted with costs and $10 costs of motion."

8. That upon the aforesaid order entered August 1, 1922, by the Supreme Court of the State of New York, in the County of Queens, and affirmed by the Supreme Court of the State of New York, in the Appellate Division, Second Department thereof, by an order resettled May 18, 1923, there was entered a judgment in favor of the said Abram B. Smart, defendant-in-error, and against the Merchants Mutual Automobile Liability Insurance Company, plaintiff-in-error, for the sum of $5,597.50 in the County of Queens, on August 22, 1922, in the said Supreme Court of the State of New York, and the said judgment was affirmed by judgment of affirmance entered March 22, 1923, upon the aforesaid order of affirmance of the Supreme Court of the State of New York, in the Appellate Division, Second Department thereof.

9. That the Court of Appeals of the State of New York dismissed an appeal from the said order and judgment of affirmance taken as of right, on or about June 6, 1923, and the Court of Appeals of the State of New York denied leave to appeal to the said Court of Appeals from the aforesaid judgment and order of affirmance, on or about the 9th day of October, 1923 (a copy of which order is hereto annexed and made a part hereof), and the Supreme Court of the State of New York, in the Appellate Division, Second Department, denied leave to appeal to the said Court of Appeals by order entered on or about July 9, 1923, in the office of the Clerk of said Court,

[fol. 44] 10. That in the Special Term of the Supreme Court of the State of New York, as well as in the Record on Appeal in the

Supreme Court of the State of New York, in the Appellate Division, Second Department, the plaintiff-in-error interposed the affidavit of George B. Hanavan, duly verified July 24, 1922, in opposition to the granting of an Order for Summary Judgment upon the following grounds:

"The application of Section 109 of the Insurance Law to the contract and policy of insurance issued by the defendant, Merchants Mutual Automobile Liability Insurance Co., to the defendant Frank Coron, and the construction of the said statute and the said contract of insurance so as to enlarge and extend the liability of the said defendant insurance company beyond and greater than the liability of the said insurance company to the defendant Frank Coron impairs the obligation of the said contract in contravention of Article 1, Section 10 of the Constitution of the United States, and deprives the said insurance company of its property without due process of law, and denies to the said insurance company the equal protection of the laws and abridges its privileges and immunities in contravention of the 14th Amendment of the Constitution of the United States, as more particularly set forth in the United States Judicial Code, Section 237, as amended, formerly known as Section 709 of the Revised Statutes of the United States."

See Record on Appeal in Supreme Court of the State of New York, folios 89-91.

11. That the Supreme Court of the State of New York in and by the aforesaid Orders and Judgment and Judgment of Affirmance overruled the contention of the plaintiff-in-error that the said Orders, Judgment and Judgment of Affirmance were repugnant to and in contravention of Article 1, Section 10 of the Constitution of the United States, and the 14th Amendment of the Constitution of the United States, and that Section 109 of the Insurance Law of the [fol 45] State of New York was void for the reasons above stated.

Wherefore your petition prays that a Writ of Error may be allowed and issued herein to the Appellate Division of the Supreme Court in and for the Second Judicial Department of the State of New York, demanding said Appellate Division to send to the Supreme Court of the United States all and singular the record and papers in the instant action, and for a citation and supersedeas to stay execution to the end that the errors of which your petitioner complains herein and in the Assignment of Errors herein filed, may be reviewed, and if errors be found, corrected conformably to the Constitution and Laws of the United States.

Dated, October 9, 1923.

Anthony J. Ernest, Attorney for Plaintiff-in-Error, Merchants Mutual Automobile Liability Insurance Company, 29 Broadway, New York, N. Y.

[fol. 46] LAWS OF NEW YORK, 1918

"182. 787.

Chap. 182

An Act to Amend the Insurance Law, in Relation to Actions Against an Insurance Carrier When Insured Person is Insolvent or Bankrupt

Became a law April 10, 1918, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section one hundred and nine of chapter thirty-three of the laws of nineteen hundred and nine, entitled "An act in relation to insurance corporations, constituting chapter twenty-eight of the consolidated laws," as added by chapter five hundred and twenty-four of the laws of nineteen hundred and seventeen, is hereby amended to read as follows:

§109. Standard Provisions for Policies Issued under the Provisions of Subdivision Three of Section Seventy.—On and after the first day of January, nineteen hundred and eighteen, no policy of insurance against loss or damage resulting from accident to or injury suffered by an employee or other person and for which the person insured is liable, or, against loss or damage to property caused by horses or by any vehicle drawn, propelled or operated by any motive power, and for which loss or damage the person insured is liable, shall be issued or delivered to any person in this state by any corporation authorized under subdivision three of section seventy of this chapter, or, if a foreign corporation, authorized to do business in this state, unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insure carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy, and stating that in case execution against the insured is returned unsatisfied in an action brought by the injured, or his or her personal representative in case death results from the accident, because of such insolvency or bankrutpcy, that then, an action may be maintained by the injured person, or his or her personal representative, against such corporation under the terms of the policy for the amount of the judgment in the said action not exceeding the amount of the policy.

§2. This act shall take effect immediately.

(L. 1909, ch. 33, §109, as added by L. 1917, ch. 524, amended.)

[fol. 47] J. A. Valentine, Successor to Scott L. Libby, Insurance, East Williston, N. Y.

Automobile Liability Policy No. 6165

Merchants Mutual Automobile Liability Insurance Company

Home Office: 168 Franklin Street, Buffalo, N. Y.

In consideration of the premium herein provided, the Merchants Mutual Automobile Liability Insurance Company, of Buffalo, New York (herein called the Company) does hereby agree

(1) To indemnify the person, firm, or corporation, named in statement 1 of the Schedule of Statements and herein called the Assured, against loss from the liability imposed by law upon the Assured for damages on account of bodily injuries or death suffered by any person or persons, (except Chauffeurs and other employees of the Assured), as the result of an accident occurring while this policy is in force and caused by reason of the use, ownership, or maintenance of any of the automobiles described in statement 4 of the said schedule, while used as described in statement 6 of the said schedule within the limits of the United States of America and Canada;

(2) To defend in the name and on behalf of the assured any suit brought against the Assured to enforce a claim, whether groundless or not, for damages on account of bodily injuries or death suffered, or alleged to have been suffered, by any person or persons within the limits designated in the preceding paragraph and under the circumstances therein described, and as the result of an accident occurring while this policy is in force:

Subject to the following conditions:

A. Upon the occurrence of an accident the Assured shall give immediate written notice thereof, with the fullest information obtainable at the time, to the Company at its home office or to the agent who has countersigned this policy. If a claim is made on account of such accident the Assured shall give like notice thereof with full particulars. If thereafter any suit is brought against the Assured to enforce such a claim, the Assured shall immediately forward to the Company at its home office every summons or other process as soon as the same shall have been served on him. This Company reserves the right to settle any claim or suit. Whenever requested by the Company, the Assured shall aid in securing information, evidence, and the attendance of witnesses; in effecting settlements; and in prosecuting appeals. The Assured shall at all times render to the Company all co-operation and assistance within his power.

B. This policy does not cover loss from liability for, or any suit based on, injuries or death by reason of the maintenance or use of

any such automobiles under any of the following conditions: (1) While being operated by or while in charge of any person who is either under the age fixed by law for drivers of automobiles, or who is in any event, under the age of 16 years; (2) While used, entered, or operated in any race or competitive speed test; (3) Suffered by any person or persons who are to be, are being, or have been carried for a consideration, actual or implied, while any such person is entering, or alighting form, any automobile described in this policy, or in riding in or upon any such automobile; (4) While being used to propel or tow any trailer or other vehicle used as a trailer, unless such liability is specifically covered herein by endorsement attached; (5) While used for any purpose other than as specified in item No. 6 of the said schedule of statements.

D. This policy does not cover loss from the liability of the Assured under, or any suit based on, any Workmen's Compensation Law providing compensatioin for workmen on a basis other than the negligence of the Assured, unless an endorsement is added hereto specifically extending the policy to cover such Workmen's Compensation Law.

E. The Assured shall not voluntarily assume any liability; nor interfere in any negotiations or legal proceedings conducted by the Company on account of any claim; nor, except at his own cost, settle any claim, nor incur any other expense without the written consent of the Company previously given; except that he may provide at the time of the accident, and at the cost of the Company, such immediate surgical relief as is imperative.

[fol. 48] G. Without prejudice to the rights of the Assured as respects anything that may occur during the period that the policy is in force, the Company may cancel this policy at any time by a written notice, stating when the cancellation takes effect, served on the Assured, or sent by registered mail to the Assured at the address given herein, at least five days prior to the date that the cancellation takes effect. The Assured may cancel this policy by like notice to the Company. If canceled by the Company, the Company shall be entitled to the earned premium, pro rata, when determined. If canceled by the Assured, the Company shall be entitled to the earned premium calculated on the basis of the short-rate table set forth hereon. The Company's check served on the Assured, or sent by registered mail to the Assured at the address given herein, shall be a sufficient tender of any unearned premium.

I. The Company shall have the right and opportunity, whenever it so desires within the period of this policy, to examine all automobiles owned or used by the Assured, and the Assured shall render reasonable assistance.

J. No assignment of interest under this policy shall bind the Company unless the written consent of the Company is set forth in an endorsement added hereto and signed by either the President, Vice-

President, Secretary, or one of the Assistant Secretaries of the Company.

K. No action shall be brought against the Company under or by reason of this policy unless it shall be brought by the Assured for a loss, defined hereunder, after final judgment has been rendered in a suit, described hereunder, and within two years from the date of such judgment, to wit: for a loss that the Assured has actually sustained by the Assured's payment in money—(a) of a final judgment rendered after a trial in a suit against the Assured; (b) of the expenses (excluding any payment in settlement of a suit or judgment) incurred by the Assured in the defense of a suit against the Assured. The Company does not prejudice by this condition any defenses against such action that it may be entitled to make under this policy.

L. If any limitation set forth in the preceding condition is prohibited by the statutes of the state in which this policy is issued, the said limitation shall be considered to be amended to agree with the minimum period of limitation permitted by such statutes.

M. In case of payment of loss under this policy, the Company shall be subrogated to all rights of the Assured against any person or corporation, as respects such loss, to the amount of such payment, and the Assured shall execute all papers required and shall co-operate with the Company to secure to the Company such rights.

N. If the Assured carries other insurance, not issued by the Company, against a loss covered by this policy, the Assured shall not be entitled to recover from the Company a large proportion of the entire loss than the proportion that the amount of this policy bears to the total amount of his valid and collectable insurance against such loss.

O. No erasure or change appearing on this policy as originally printed nor change or waiver of any of its terms or conditions or statements, whether made before or after the date of this policy, shall be valid unless set forth in an endorsement added hereto and signed by either the President, Vice-President, Secretary or one of the Assistant Secretaries of the Company. Neither notice given to nor the knowledge of any agent or any other person, whether received or acquired before or after the date of this policy, shall be held to waive any of the terms or conditions or statements of this policy, or to preclude the Company from asserting any defense under said terms, conditions, and statements, unless set forth in an endorsement added hereto and signed by one of the said officers.

P. No person shall be deemed an agent of the Company unless such person is authorized in writing as such agent by either the President, Vice-President, Secretary, or one of the Assistant Secretaries of the Company.

Q. Upon the acceptance of this policy, the assured becomes a Member of the Company and has a right of voting at its meetings

as provided for in the By-Laws of the Company, filed with the Superintendent of Insurance of the State of New York, and said By-Laws are hereby made a part of this policy. In addition to the premium provided for in this policy the Assured agrees to pay such assessments as may be made by the Company in conformity with the Insurance Law and the Charter and By-Laws of the Company. The By-Laws of the Company provide that the liability of any member to assessment for any one policy year or part thereof shall be at least, but in no event greater than an amount equal to twice the amount of and in addition to the cash premium written in the policy. But no member shall be assessed or assessable except for losses and expenses incurred while he was a member, nor unless he be notified of such assessment within one year after the expiration of this policy.

R. The Company may from time to time fix and determine, subject to the approval of the Superintendent of Insurance of the State of New York, the amount to be declared and paid as a dividend to members after retaining sufficient sums to pay all outstanding policy and other obligations

S. This policy is issued in consideration of the premium charged therefor, and of the statements which are set forth hereon in the Schedule of Statements and which the Assured makes and warrants to be true by the acceptance of this policy.

Pol. No. 6165. Renewal of Pol. No. —.

T. The Company's liability for loss from an accident resulting in bodily injuries to or in the death of one person is limited to five thousand ($5,000) dollars and, subject to the same limit for each person, the Company's total liability for loss from any one accident resulting in bodily injuries to or in the death or more than one person is limited to ten thousand ($10,000) dollars. The expenses incurred by the Company in defending any suit, including the interest on any verdict or judgment and any costs taxed against the Assured, will be paid by the Company irrespective of the limit expressed above.

V. The term of this policy is 12 months, beginning at noon on the 16th day of August, 1919, and ending at noon on the 16th day of August, 1920, standard time at the Assured's address hereinafter set forth.

[fol. 49] Important

It is hereby understood and agreed that the protection provided in this policy is extended to cover any person of legal age who is authorized by the assured, named herein, to drive the within mentioned automobiles.

Merchants Mutual Automobile Liability Ins. Co. Buffalo, N. Y., Urban D. Jehle, President.

Attached to and forming part of policy No. 6165.

[fol. 50] Loss of Use

In consideration of an additional premium, it is understood and agreed that the Assured's liability for damage to or the destruction of the Property of others covered under the Property Damage Insurance Endorsement includes Liability for the resultant Loss of Use of such property damaged or destroyed.

Such property damage insurance as hereby amended is subject to the same limits and conditions of liability as heretofore.

This endorsement becomes effective on the 16th day of August, 1919, standard time.

Attached to and forming part of Policy No. 6165, dated August 16, 1919 issued by the Merchants Mutual Automobile Liability Insurance Co. of Buffalo, N. Y., to Frank Coron.

Urban D. Jehle, President.

Countersigned at Buffalo this 16th day of August, 1919.

J. Alfred Valentine, Authorized Agent.

[fol. 51] Original. No. —

Endorsement

Merchants Mutual Automobile Liability Insurance Co.

Buffalo, New York

Insolvency Endorsement Pursuant to § 109 of the Insurance Laws of New York

Date: August 16th, 1919.

The insolvency or bankruptcy of the insured hereunder shall not release the company from the payment of damages for injuries sustained or loss occasioned during the life of this policy, and in case execution against the insured is returned unsatisfied in an action brought by the injured, or his or her personal representative in case death results from the accident, because of such insolvency or bankruptcy, then an action may be maintained by the injured person or his or her personal representative against this company under the terms of this policy, for the amount of the judgment in the said action not exceeding the amount of this policy.

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, agreements or limitations of said Policy other than as above stated.

In witness whereof, The Company has caused this endorsement to be signed by its President; but the same shall not be binding upon the Company unless countersigned by its Authorized Agent.

This endorsement becomes effective on the 16th day of August, 1919, noon, standard time.

Attached to and forming part of Policy No. 6165, dated August 16th, 1919, issued by the Merchants Mutual Automobile Liability Insurance Company of Buffalo, N. Y., to Frank Coron.

Urban D. Jehle, President.

Countersigned at Buffalo this 16th day of August, 1919.

J. Alfred Valentine, Authorized Agent.

[fol. 52] Original. No. —

Endorsement

Merchants Mutual Automobile Liability Insurance Co.

Buffalo, New York

Property Damage Insurance (for Automobile Liability Policies Only)

Date: August 16th, 1919.

In consideration of an additional premium of $99.00, the Company, subject to all the terms and conditions of this policy except as herein specifically provided, hereby agrees—

(1) To indemnify the Assured against loss from the liability imposed by law upon the Assured for damage on account of any injury to or destruction of any property (excepting property excluded below), caused by the use, ownership, or maintenance, while this endorsement is in force, of any automobile described in the schedule of this policy while such automobile is used as described in the said schedule within the limits of the United States of America, Canada, and Mexico.

(2) To defend any suit brought against the Assured to enforce a claim, whether groundless or not, for damages on account of any injury to or destruction of any property (excepting property excluded below) caused, or alleged to have been caused, in the manner and under the circumstances and within the limits specified in the preceding paragraph and while this endorsement is in force.

Property carried in or upon any automobile described in this policy, property belonging to the Assured, property in charge of the Assured, property in charge of any employee of the Assured, and property lost, damaged, or destroyed by any accident excluded under the policy as a cause of bodily injuries or death is hereby excluded as not covered under this policy.

The Company's liability hereunder for a loss the result of any one accident is limited to one thousand dollars, whether the property injured or destroyed belongs to one or more persons; but the Company's liability for any injury to or destruction of any property shall not exceed the actual cash value of such property at the time of the accident, nor in any event the actual cost of the repairing or the replacing of such property.

The term of this endorsement begins on the 16th day of August, 1919, at noon, standard time at the Assured's address set forth in the policy, and ends at the time of the expiration, termination, or cancelation of this policy.

This endorsement forms a part of the policy described below, but it shall not be binding upon the Company until countersigned by a duly authorized representative of the Company.

Attached to and forming part of Policy No. 6165, dated August 16th, 1919, issued by the Merchants Mutual Automobile Liability Insurance Company of Buffalo, N. Y., to Frank Coron.

Urban D. Jehle, President.

Countersigned at Buffalo this 16th day of August, 1919.

J. Alfred Valentine, Authorized Agent.

[fol. 53] Schedule of Statements

Statement 1: Name of Assured: Frank Coron.

Statement 2: Address of Assured: Wantagh Ave., Wantagh, Nassau County, N. Y.

Statement 3: The Assured is (State whether individual, co-partnership, corporation, receiver, assignee, or trustee) Individual.

Statement 4: The number and description of all automobiles covered by this policy are given in the following table:

Descriptive trade name	Factory number	Year of model	Type of body	Power			Premiums		
					Horse power				
				Kind	Adv.	Ins.	Liability	Prop. damage	Collision
Alco ..	134165	1910	truck	gas	....	....	$5.00	30.00	
Alco ..	53A882	1910	truck	gas	....	....	$5.00	30.00	
Alco ..	53A870	1910	truck	gas	....	....	$5.00	30.00	
								9.00	L. of U.

Automobile is used for Commercial use, trucking, excluding the hauling of pianos, safes, structural iron, or steel, safes and other classes of material which are considered heavy trucking.

Total premium for policy is $354.00.

Statement 5: The Assured's trade or business is general trucking.

Statement 6: The automobiles described above are used for the following purposes only: As above.

Statement 7: The Assured will not during the term of this policy rent any automobile to others or use any automobile to carry passengers for a consideration, actual or implied, except as follows: No exceptions.

Statement 8: All the automobiles described above are usually kept in the city or town named in Statement 2, except as follows: No exceptions.

Statement 9: No company during the past three years has refused to issue automobile liability insurance to the Assured and no company has cancelled during the said period any such insurance issued to the Assured, except as follows: No exceptions.

In witness whereof the Company has caused this policy to be signed by its President and Secretary, but the policy shall not be binding upon the Company until countersigned by a duly authorized representative of the Company.

Urban D. Jehle, President. Owen B. Augspurger, Secretary.

Countersigned by J. Alfred Valentine, Authorized Representative.

Table of Short Rates Showing What Percentage of Premium is Earned at Any Given Date

Number of months since issuance of policy	1	2	3	4	5	6	7	8	9	10	11	12
Percentage of premium earned	20	30	40	50	60	70	75	80	85	90	95	100

[fol. 54]

Officers

Urban F. Jehle ..... President
M. S. Tremaine ..... Vice-President
J. R. Young ..... Vice-President and Manager
G. H. H. Hills ..... Treasurer
Owen B. Augspurger ..... Secretary and Counsel

Directors

Owen B. Augspurger, Attorney, Buffalo, N. Y.
A. J. Deer, President The A. J. Deer Co., Hornell, N. Y.
Howard Bissell, Cashier, Peoples Bank, Buffalo, N. Y.
G. H. H. Hills, Treasurer, Montgomery Bros. & Co., Buffalo, N. Y.
Urban F. Jehle, Merchant, President New York State Association of Retail Grocers, Buffalo, N. Y.
James H. Maher, President Maher Development Co., Buffalo, N. Y.
Louis H. Parker, Assistant Manager, Lumber Underwriters, New York.
Eugene F. Perry, Manager Lumber Underwriters, Vice-President and Manager Lumber Mutual Casualty Ins. Co., New York.
Eugene Tanke, Jeweler, Director Buffalo Trust Co., Buffalo, N. Y.
M. S. Tremaine, President, J. G. Wilson Corporation, Buffalo, N. Y.
H. O. Patterson, Treasurer and Manager, Elmira Wholesale Grocery Co., Elmira, N. Y.
Charles Thorpe, Editor Retail Grocers' Advocate; Secretary, N. Y. State Association of Retail Grocers, New York.
J. R. Young, President J. R. Young & Co., Inc., Insurance, Buffalo, N. Y.

Endorsed: Merchants Mutual Automobile Liability Insurance Company. Home Office: 168 Franklin Street, Buffalo, N. Y. Important: Immediate notice of an accident, however slight, is required. J. A.

Valentine, successor to Scott L. Libby, Insurance, East Williston, N. Y. Please read your policy. Automobile Liability Policy. 561 W. R. D. No. 6165. Issued to Frank Coron, Wantagh Avenue, Wantagh, Nassau County, N. Y.

[fol. 55] Copy

STATE OF NEW YORK:

IN COURT OF APPEALS

At a Court of Appeals for the State of New York Held at Court of Appeals Hall, in the City of Albany, on the Ninth Day of October, A. D. 1923

Present: Frank H. Hiscock, Chief Judge, presiding.

ABRAM B. SMART, Respondent,

vs.

MERCHANTS MUTUAL AUTOMOBILE LIABILITY INSURANCE COMPANY, Appellant

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

A copy.

Wm. J. Armstrong Deputy Clerk. (Seal.)

Service of the within Petition for Writ of Error is hereby admitted on behalf of Abram B. Smart, the defendant in error, this 19th day of October, 1923.

Claude J. Banigan, Theodore H. Lord, Attorney- for Defendant-in-Error.

[fols. 56-58] BOND ON WRIT OF ERROR FOR $7,500—Approved and filed October 18, 1923; omitted in printing

[fol. 59] IN SUPREME COURT OF UNITED STATES

WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Presiding Justice and the Justices of the Supreme Court of the State of New York, in the Appellate Division, Second Department, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of New York, in the Appellate Division, Second Department thereof, before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between Abram B. Smart and Merchants Mutual Automobile Liability Insurance Company, a corporation, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of their validity, a manifest error hath happened to the great damage of the said Merchants Mutual Automobile Liability Insurance Company, the Plaintiff-in-Error, as by its complaint appears. We being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same in the said Supreme Court at Washington, D. C., within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, the eighteenth day of October, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States. (Seal of the Supreme Court of the United States.)

Allowed by Louis D. Brandeis, Associate Justice of the Supreme Court of the United States.

[fol. 59½] Service of the within Writ of Error is hereby admitted on behalf of Abram B. Smart, the defendant in error, this 19th day of October, 1923.

Claude J. Banigan, Theodore H. Lord, Attorneys for Defendant-in-Error.

[fols. 60 & 61] CITATION—In usual form, showing service on Abram B. Smart; omitted in printing

Endorsed on cover: File No. 29,961. New York Supreme Court. Term No. 223. Merchants Mutual Automobile Liability Insurance Company, plaintiff in error, vs. Abram B. Smart. Filed November 16, 1923. File No. 29,961.

(2)

JAN 21 1965

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1964

No. 425

MERCHANTS MUTUAL AUTOMOBILE LIA-
BILITY INSURANCE COMPANY,

Plaintiff-Appellant
(Defendant below)

against

ABRAM P. SHAPP,

Defendant-Appellee
(Plaintiff below)

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Supreme Court of the United States

OCTOBER TERM, 1924.

No. 223.

MERCHANTS MUTUAL AUTOMOBILE LIABILITY INSURANCE COMPANY,
Plaintiff-in-Error
(*Defendant below*),
against

ABRAM B. SMART,
Defendant-in-Error
(*Plaintiff below*).

BRIEF FOR PLAINTIFF-IN-ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

(Note: The plaintiff-in-error will be referred to hereinafter as the defendant; and the defendant-in-error will be referred to as the plaintiff.)

STATEMENT.

Writ of Error to review a final judgment of the Supreme Court of New York in the Appellate Di-

vision, Second Judicial Department thereof, entered May 18, 1923, and affirming a judgment entered against the plaintiff-in-error (defendant below) for the sum of $5,597.50, and from the orders upon which the said judgment was entered.

Summary judgment was ordered to be entered against the defendant, upon a motion heard and determined at the Special Term of the said Supreme Court (see order pages 4-5) in pursuance of Rule 113 of the New York Rules of Civil Practice.

Rule 113 of the New York Rules of Civil Practice provides that judgment may be ordered against the defendant in an action upon a judgment for a stated sum

> "unless the defendant by affidavit, or other proof, shall show such facts as may be deemed, by the judge hearing the motion sufficient to entitle him to defend."

Facts.

The complaint alleged (complaint paragraph 1), Record page 7:

> "1. Upon information and belief that the defendant is a corporation organized and existing by virtue of the Insurance Laws of the State of New York, and at the time hereinafter mentioned was duly licensed to do business within the state of New York as an insurance corporation and authorized and empowered to issue policies of insurance to residents of the State of New York insuring them against loss or damage to any person and for which the person insured is liable."

The affidavit submitted in support of the motion for judgment also set forth at pages 16 and 17 of the Record following:

> "In and by said answer the defendant admits that it is a corporation organized under the Insurance Law of the State of New York, authorized to do business and to issue policies of Insurance to residents of the State of New York, and insure them against loss or damage to any person for which the person insured is liable; * * *."

On August 16, 1919, the defendant issued a policy of indemnity insurance to one, Frank Coron, in consideration for the payment by the said Coron of the total premium of $354 (Record, page 50).

Briefly summarized, as far as material, the said policy provided that in consideration of the premium the insurance company agreed:

1. To indefmnify the assured against loss from liabiilty imposed by law upon the assured for damages on account of bodily injury suffered by any person as a result of an accident (Record, page 44).

2. The policy also provided (Record, pages 45-46):

> "J. No assignment of interest under this policy shall bind the Company unless the written consent of the Company is set forth in an endorsement added hereto and signed by either the President, Vice-President, Secretary, or one of the Assistant Secretaries of the Company."

"K. No action shall be brought against the Company under or by reason of this policy unless it shall be brought by the Assured for a loss, defined hereunder, after final judgment has been rendered in a suit, described hereunder, and within two years from the date of such judgment, to wit: for a loss that the Assured has actually sustained by the Assured's payment in money—(a) of a final judgment rendered after a trial in a suit against the Assured; (b) of the expenses (excluding any payment in settlement of a suit or judgment) incurred by the Assured in the defense of a suit against the Assured. The Company does not prejudice by this condition any defenses against such action that it may be entitled to make under this policy."

3. And also (Record, page 46):

"M. In case of payment of loss under this policy, the Company shall be subrogated to all rights of the Assured against any person or corporation, as respects such loss, to the amount of such payment, and the Assured shall execute all papers required and shall cooperate with the Company to secure to the Company such rights."

4. And also (Record, page 47):

"T. The Company's liability for loss from an accident resulting in bodily injuries to or in the death of one person is limited to five thousand ($5,000) dollars and subject to the same limit for each person, the Company's

total liability for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to ten thousand ($10,000) dollars. The expenses incurred by the Company in defending any suit, including the interest on any verdict or judgment and any costs taxed against the Assured, will be paid by the Company irrespective of the limit expressed above."

5. And also (Record, page 48):

"Endorsement.

Merchants Mutual Automobile Liabilitay Insurance Co., Buffalo, New York,

Insolvency Endorsement Pursuant to Sec. 109, of the Insurance Laws of New York.

Date: August 16th, 1919.

The insolvency or bankruptcy of the insured hereunder shall not release the company from the payment of damages for injuries sustained or loss occasioned during the life of this policy, and in case execution against the insured is returned unsatisfied in an action brought by the injured, or his or her personal representative in case death results from the accident, because of such insolvency or bankruptcy, then an action may be maintained by the injured person or his or her personal representative against this company under the terms of this policy, for the amount of the judgment in the said action not exceeding the amount of this policy.

"Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, agreements or limitations of said policy other than as above stated.

"In witness whereof, The Company has caused this endorsement to be signed by its President; but the same shall not be binding upon the Company unless countersigned by its Authorized Agent.

"This endorsement becomes effective on the 16th day of August, 1919, noon, standard time."

Thereafter on March 30th, 1921, Abram B. Smart, the plaintiff recovered a judgment against Frank Coron, the assured in the above named policy for $11,354.05 damages and costs (page 17, of Record), for injuries sustained in a collision wtih the automobile truck of said Frank Coron (Record, page 18).

Execution Returned Unsatisfied.

An execution was issued upon the said judgment, but was returned unsatisfied (Record, page 18).

Alleged Insolvency of Frank Coron.

The affidavit submitted in support of the motion for judgment stated that Frank Coron was insolvent by reason of the return of the said execution unsatisfied (Record, pages 18-19); and also because:

"the said Frank Coron had not sufficient property to pay his debts including this judgment * * *" (Record, fol. 57).

This last statement is based upon the examination of the said Frank Coron in supplementary proceedings in aid of the judgment, which examination is annexed to the moving affidavit and marked Exhibit B (Record, pages 22-25).

EXAMINATION IN SUPPLEMENTARY PROCEEDINGS.

The examination in supplementary proceedings showed that Frank Coron was in the trucking business for about nineteen years (Record, page 22).

Frank Coron owned three automobile trucks, for which he paid respectively $1800; $700 and $400. The three trucks were motor trucks, two were three-ton Alco trucks and the third was a converted touring car licensed as a one-ton truck (Record, page 23).

There are no mortgages on the trucks. There are no other judgments against Frank Coron; and no other actions were pending agains him (Record, page 24).

Frank Coron had an income of $100 a week for the three months previous to July 28, 1921, the date of his examination (Record, page 25).

The statement in the opposing affidavit (Record, page 31):

> "And that as a matter of fact, the said Frank Coron has received an income of $100 a week for three months preceding July 28, 1921; and it appears that no order for an execution against the income of the said Frank Coron has been made in pursuance of Section 684 of the Civil Practice Act of New York."

is not contradicted in the record.

OPINION OF SPECIAL TERM.

The opinion of the Justice at Special Term, refers to the fact that the answer denies the insolvency of Frank Coron (Record, page 34) and the opinion also refers to another opinion of the same Justice as authority for the holding that the return of an execution unsatisfied is prime facie evidence of insolvency. But as appears from the opinion the learned Justice also stated (Record, page 34):

> "In addition there is the examination of the assured in supplementary proceedings which establishes the fact, and his insolvency is not really denied by the opposing affidavit."

As stated above the answer denies the insolvency in formal language (Record page 12) and the affidavit in opposition sets forth the property owned by Frank Coron and also states (Record, page 31):

> "That upon information and belief the defendant Frank Coron is not insolvent within the meaning of any law covering insolvency. And that as a matter of fact, the said Frank Coron has received an income of $100 a week for three months preceding July 28, 1921; and it appears that no order for execution against the income of the said Frank Coron has been made in pursuance of Section 684 of the Civil Practice Act of New York."

(Note: The statute in question, which is printed in full hereinafter, provides

> "in case execution against the insured is returned unsatisfied * * * because of such insolvency or bankruptcy, that then, an action may be maintained by the injured person * * *.")

THE CONTENTION OF PLAINTIFF-IN-ERROR.

Plaintiff in error contends that the judgment should be reversed for the reasons:

1. That Section 109 of the Insurance Law of New York is void because it violates the Constitution of the United States; and

2. The Supreme Court of the State of New York erred in holding that as a matter of law the assured person, Frank Coron, was insolvent or bankrupt; and also erred in denying a jury trial of any of the issues of fact, and in ordering summary judgment upon the complaint.

Other facts are referred to under the Points, to which reference is respectfully requested.

The Statute.

(Record, page 43.)

"182 787

LAWS OF NEW YORK, 1918.

CHAP. 182.

AN ACT to amend the insurance law, in relation to actions against an insurance carrier when insured person is insolvent or bankrupt.

Became a law April 10, 1918, with the approval of the Governor. Passed, three-fifths being present.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLOWS:

Section 1. Section one hundred and nine of chapter thirty-three of the laws of nineteen hundred and nine, entitled 'An act in relation to insurance corporations, constituting chapter twenty-eight of the consolidated laws,' as added by chapter five hundred and twenty-four of the laws of nineteen hundred and seventeen, is hereby amended to read as follows:

§109. STANDARD PROVISIONS FOR POLICIES ISSUED UNDER THE PROVISIONS OF SUBDIVISION THREE OF SECTION SEVENTY. On and after the first day of aJnuary, nineteen hundred and eighteen, no policy of insurance against loss or damage resulting from accident to or injury suffered by an employee or other person and for which the person insured is liable, or against loss or damage to property caused by horses or by any vehicle drawn, propelled or operated by any motive power, and for which loss or damage the person insured is liable, shall be issued or delivered to any person in this state by any corporation authorized under subdivision three of section seventy of this chapter, or, if a foreign corporation ,authorized to do business in this state, unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release

the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy, and stating that in case execution against the insured is returned unsatisfied in an action brought by the injured, or his or her personal representative in case death results from the accident, because of such insolvency or bankruptcy, that then an action may be maintained by the injured person, or his or her personal representative, against such corporation under the terms of the policy for the amount of the judgment in the said action not exceeding the amount of the policy.

§2. This act shall take effect immediately.

(L., 1909, ch. 33, §109, as added by L., 1917, ch. 524, amended.)"

POINT.

Section 109 of the Insurance Law (Ch. 182 of Laws, 1918, as amended) is void because it violates the Constitution of the United States.

By reason of the

"insolvency or bankruptcy"

of one Frank Coron (insured by the defendant against loss), a judgment has been rendered against the defendant for $5597.50.

Aside from the provision of Sec. 109, of the Insurance Law (in Ch., 182, of Laws, 1918, as amended), no liability would exist in favor of the plaintiff and against the defendant (Burke vs. London G. & A. Co., 47 Misc., 171, aff'd on opinion below, 126 App. Div., 933, and unanimously af-

firmed with costs without any opinion, 199 N. Y., 557) but with the following memorandum:

> "Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, entered May 13, 1908, affirming a judgment in favor of defendant entered upon a decision of the Court on trial at Special Term in an action to recover the amount of a judgment for personal injuries theretofore recovered against an insolvent corporation which at the time was insured by defendant against such liability."

Can this liability be imposed upon the defendant by this statute?

We contend that such liability cannot be imposed without violating the Constitution of the United States.

PRELIMINARY CONSIDERATIONS.

1. The contract with Coron is for the indemnifying of Coron against loss. He has suffered no loss. It is the law of New York in such case, that he could not maintain an action upon the policy.

2. Coron's assignee or trustee in bankruptcy can recover upon the contract, because Coron's rights thereunder would pass to them; but only for the proportionate amount actually paid out by them.

3. While it is true that the statute was enacted before the making of the policy, and

in pursuance of the command of the statute that: "No policy of insurance * * * shall be issued or delivered * * *" without containing a clause as above set forth (Sec. 109, of the Insurance Law), and such clause was written into the policy, by the compulsion of the very statute whose validity is attacked; and the defendant contends that an unconstitutional statute binds no one and has no more force than if it did not exist (Saratoga Warter Corp. vs. Pratt, 227 N. Y., at 447; Gunn vs. Barry, 15 Wall., 610; Home I. Co. vs. Morse, 20 Wall., 445; U. P. Co. vs. Pub. Dev. Co., 248 U. S., 67).

When the policy was written, the liability of the Insurance Company was contingent and might never become a debt. The Insurance Company might be called upon to pay only indemnity. It might be reimbursed by subrogation. Under these circumstances, it could not claim to be threatened with money loss. In insolvency proceedings, a surety for the insolvent cannot assert any claim until a debt has accrued upon his contract. In Conklin vs. U. S. Shipblilding Company, 136 Fed., 1006, the Court said at page 1008:

"Its liability upon the bonds is a contingent one, that may never become a debt. Its right is a right of indemnity out of the assets of its principal, but until it has been damnified there is no basis upon which it can ask to be indemnified. Such is the clear rule of the bankruptcy law. In Riggin vs. Magwire, 15 Wall., 549, the Court construed the language of the bankruptcy act of 1841, which allowed

> 'uncertain and contingent demands' to be proven against a bankrupt's estate. It was declared that so long as it remained wholly uncertain whether a contract would ever give rise to an actual duty or liability, and there were no means of removing the uncertainty by calculation, the contract was not provable. In Dunbar vs. Dunbar, 190 U. S., 340, it was held that a claim founded upon an agreement by a husband to pay his wife, from whom he had secured a divorce, a certain sum annually during life or until she should marry, was not provable under the present bankruptcy act, except as to payments due at the time of the adjudication of the husband's bankruptcy."

And when the policy was made, for all that was then presented, the insured would pay any loss, and indemnity would be repaid to him, and a claim based upon his "insolvency or bankruptcy" would not be made. And at this time, the defendant being about to suffer a loss by reason of the enforcement of the judgment herein, defendant is a person having a direct, immediate and tangible interest and right to contest the validity of the statute, under color of which judgment is about to be enforced against it (Cargill Co. vs. Minn., 180 U. S. at 468; Home Ins. Co. vs. Morse, 20 Wall., 445);

> and defendant contends that said judgment cannot be enforced against it without violating the Constitution (Eau Claire Bank vs. Jackman, 204 U. S., 522, opinion by Mr. Justice McKenna).

And whether this statute is unconstiutional will be decided upon what may be done under it (Eubank vs. Richmond, 226 U. S., 137).

No Injunction will lie to restrain the enforcement of an unconstitutional statute in New York State (Buffalo Gravel Co. vs. Guy B. Moore, 234 N. Y., at 342-343, and see discussion of this case in Report of New York State Bar Association, pages 229, et seq.). No injunction "restraining the action of any officer of such state" could have been asked for because no officer had taken or was about to take any action in the matter. And an adequate remedy at law exists against the enforcement of an unconstitutional statute, in the absence of showing immediate and irreparable damage. As we have pointed out and as was held in the Conkling case (136 Fed., 1006, citing cases) no damage accrues until a debt is created by virtue of a contract.

In Home Ins. Co. vs. Morse, 20 Wall., 445, the Insurance Company filed a written agreement with the Secretary of State of Wisconsin, in which the company agreed not to remove any suits brought against it to the Federal Courts. This Court said:

> "3. The agreement of the Insurance Company derives no support from an unconstitutional statute and is void, as it would be had no such statute been passed."

(To the same effect are U. P. Co. vs. Pub. Com., 248 U. S., 67; Saratoga Water Corp. vs. Pratt, 227 N. Y., at 447; Gunn vs. Barry, 15 Wall., 610.)

4. The statute

> "in case of insolvency or bankruptcy"

changes the undertaking of the defendant from one of indemnity to the insured Coron, to an arbitrary liability to his creditor, regardless of any indemnity to Coron or right of his trustee or assignee to collect under the policy because of his insolvency or bankruptcy.

But it is claimed that this plaintiff is not confined to Coron's right to indemnity. The plaintiff has acquired an absolute right by statute to the full amount of the policy, it is said.

I.

The statute complained of conflicts with the Bankruptcy Law. Whether it be applied in case of "insolvency or bankruptcy," it must be deemed to be superseded by the Bankruptcy Law.

When insolvency or bankruptcy is shown to exist, the statute commands that the full amount of the claim of one creditor must be paid to the limit of the indemnity policy; and such payment must be made directly to the creditor.

This result cannot be accomplished without overriding the Bankruptcy Law both as to its fundamental purpose and its special provisions.

The claim of Smart, the tort-judgment-creditor and plaintiff below is provable in and will be discharged in bankruptcy.

1. Indemnity insurance money to indemnify for loss upon a claim for personal injuries under a policy such as that sued upon herein belongs to the trustee in bankruptcy (Moses vs. Travelers I. Co., 63 N. J. Eq., 260; Georgia Cas. Co. vs. Bowron, 233 Fed., 89; Maryland Cas. Co. vs. Omaha

Co., 157 Fed., 514; Frye vs. Bath Gas & Electric Co., 97 Me., 241).

2. The statute commands that a particular creditor shall be paid in full to the limit of the policy of indemnity. Other creditors of the assured must take their pro rata distribution in bankruptcy or insolvency proceedings. In the instant case this preferential payment to a particular creditor is not made possible by reason of the solvency of the debtor or by reason of lack of notice of insolvency upon the part of the indemnitor, but on the contrary it is expressly provided that in case of insolvency or bankruptcy, then the particular creditor who happens to have been injured by the assured is commanded to be paid the full amount of his claim to the limit of the policy.

Under the circumstances such a distribution of money belonging to the bankrupt is prohibited by the Bankruptcy Law.

Eau Claire Bank vs. Jackman, 204 U. S., 522;
Clarke vs. Rogers, 228 U. S., 534, 542, 544, 548;
State Bank vs. Ingram, 237 Fed., 76;
Closser vs. Strawn, 227 Fed., 138, 146, 147
In re Caledonia Coal Co., 254 Fed., at 747, 748;
In re Riehl, 200 Fed., at 457;
In re Rouse, Hazard Co., 91 Fed., 96;
In re Blake et al., 89 Fed., 691;
In re Brinn, 262 Fed., 527, 529-530 and cases cited;

Parmentier Mfg. Co. vs. Hamilton, 51 N. E., 529; 172 Mass., 178;
In re Jacobson, 181 Fed., 870;
In re Adams & Hoyt, 164 Fed., 489;
In re Southern Pharmaceutical Co., 286 Fed., 148.

The fundamental purpose of Bankruptcy to draw all property into the control of the trustee and to make an equal distribution to all creditors, was recognized and carried into effect in Globe Bank & T. Co. vs. Martin, 236 U. S., 285. A state law confined the benefit of attachments in suits to set aside fraudulent conveyances to antecedent creditors. But this Court held that the Bankruptcy law governed the distribution for all creditors.

The opinion concludes at page 304:

> "after the conveyance was set aside in the state court, for which purpose the state court is given concurrent jurisdiction by sec. 70 of the bankruptcy act, it (i. e., the Bankruptcy Court) had the right to determine for itself the disposition of the fund arising from the property sold. Miller vs. New Orleans Acid & F. Co., 211 U. S., 496."

To similar effect is Watkins vs. Sedberry, 261 U. S., 571, at 578, opinion by Mr. Justice Butler.

3. Insurance money which the bankrupt could collect generally belongs to the trustee in bankruptcy (Andrews vs. Partridge, 228 U. S., 479; Cohn vs. Malone, 248 U. S., 450, Minden vs. Clement, 256 U. S., at page 128).

An assignee who pays the claim of the injured person may also recover from the indemnity insurance company to the extent of the amount paid (Maryland Cas. Co. vs. Omaha Co., 157 Fed., 514).

4. Premiums for indemnity insurance paid by a debtor who becomes insolvent or bankrupt give such debtor an interest in the insurance bought by such premiums, notwithstanding that another person may have a different or greater interest in such insurance, as in the case of a mortgagor and mortgagee, where the mortgagor pays the insurance premium for the benefit of the mortgagee as his interest may appear. This principle was applied in Stearn Salt & Lumber Co. vs. Hammond, 217 Fed., 559, where the Court said in part, at page 562:

> "But if the testimony is to be interpreted as meaning that the policy actually ran to the trustee, and did, in terms secure the mortgagor's interest, yet, under the circumstances stated, including the facts that the insurance was taken by virtue of the mortgage provision and at the expense of the mortgagor, the latter was entitled to its benefit to the extent of having its proceeds applied pro tanto to the liquidation of the mortgage debt (Pendelton vs. Elliott, 67 Mich., 496, 498, 35 N. W., 97), and equitably, at least, was entitled to whatever was collected beyond the amount necessary or desired to satisfy the claims of the mortgagee thereon. See Wheeler vs. Insurance Co., 101 U. S., 439, at page 441, 25 L. Ed., 1055; and see Brown City Saving Bank vs. Windsor (C. C. A., 6th Cir.),

198 Fed., 28, 30, 117 C. C. A., 136, 41 L. R. A. (N. S.), 1012, and following, where the relative rights of mortgagor and mortgagee under the mortgage loss provisions in insurance policies are discussed in an opinion by Judge Warrington."

5. The defendant insurance company, being informed of the insolvency of the assured, by the adjudication herein adjudging the assured to be insolvent is not permitted to pay to a particular creditor,—even assuming but not conceding that such creditor were named in the policy—the full amount of the policy, regardless of the right of a trustee in bankruptcy to recover the amount of the insurance which the bankrupt or such trustee might claim (Frederick vs. Fed. Ins. Co., 256 U. S., 395; F. & D. Co. vs. Queens Co. T. Co., 226 N. Y., 232-233; Cohn vs. Malone, 248 U. S., 450).

After an adjudication that the debtor is insolvent or bankrupt, it is not permissible under the bankruptcy law for one creditor, with knowledge of the insolvency and with knowledge that the payment received by such creditor will give him a much larger payment than any other creditor receives, to take and pay over money to that particular creditor, which could be claimed by the insolvent or bankrupt debtor. This sort of a situation was before the Court in Merrimack National Bank vs. Bailey, 289 Fed., 468 (Cert. denied 68 L. ed., 18; 44 S. C., 33), where it was said in part at page 470:

"But in this case the deposits were not made 'in the usual course of business.' There was no 'usual course of business' after No-

vember 1. The insolvent's business was then shut down; it was being liquidated by its creditors; naturally enough, the proceeds of liquidation were deposited in various creditor banks. The understanding that no preference should be given was, in effect, nothing but a recognition of the requirements of the law. The situation here disclosed illustrates the fallacy and unfairness of the appellant's contention. If the creditor's committee had succeeded within the four months in turning substantially all the insolvent's assets into cash and depositing it with the creditor banks (subject only to trifling withdrawals by check for liquidation purposes), and if then the banks had had and had exercised the right of set-off claimed by the present appellant, substantially all of the assets would have been appropriated by the bank creditors, leaving nothing for the general merchandise creditors. A result more obnoxious to the principle of equality, which underlies the Bankruptcy Act, can hardly be imagined. Compare in re Fairburn Oil & Fertilizer Co. (D. C.), 240 Fed., 835; Firt National Bank vs. Harper, 254 Fed., 641."

6. In addition to paying one creditor more than any of the others, such creditor is excused from paying any part of (1) the expenses of administration of the bankrupt's estate, (2) taxes, (3) labor and other prior claims, (4) is excused from any conformity to the Bankruptcy Law as to protecting the interest of the insolvent or bankrupt assured party in his insurance policy for which he has paid the premiums, or the rights and estates of partners, and the right of the trustee to

insurance money which the bankrupt might claim and the indemnitor's right to subrogation and general equitable relief is plainly defeated (U. S. Fid. & G. Co. vs. Bray, 225 U. S., 205, at 216-219).

7. The general law of New York concerning preferences conflicts with the Bankruptcy Law; but the general law merely authorizes a preference to particular creditors to the extent of one-third of the insolvent's estate. The indemnity policy in the instant case, if the statute be enforced, will result in a much larger preference to a particular creditor, and in fact such creditor would be substantially paid in full. This result can only be sanctioned by the statute which plainly conflicts with the Bankruptcy Law.

The New York State statute governing preferences in General Assignments for Creditors provides, as far as material (Debtor and Creditor Law, §23):

> §23. Limitation of preferences. In all general assignments of the estates of debtors for the benefit of creditors any preference created therein, other than for wages or salaries of employes under the last section, shall not be valid except to the amount of one-third in value of the assigned estate left after deducting such wages and salaries, and the costs and expenses of executing such trust; * * *."

Inasmuch as the New York Court of Appeals has recognized that the New York State Assignment Law for Insolvents is suspended by the National Bankruptcy Act (Cohen vs. American Surety Co., 192 N. Y., 227), in which New York law

preferences are permitted,—it would seem to be very plain that an insolvent statutory provision for a preference of a very limited class of persons arbitrarily selected upon grounds wholly fortuitous, must also be deemed to be suspended by the comprehensive provisions of the Bankruptcy Law.

The New York State Law treating of the equitable distribution of estates of Insolvents (i. e., N. Y. Debtor & Creditor Law) which statute allowed preferences to the limited extent of one-third of the state, being suspended by the Bankruptcy Law, the only remaining New York laws concerning preferences are statutes prohibiting and AVOIDING such preferences for the benefit of creditors. In this situation, a statute of New York attempting to authorize and to effectuate an arbitrary preference to a small number of tort creditors preferred over all other creditors both tort and contract, must be deemed a fortiori to be equally suspended by the Bankruptcy Law. Other creditors, of course, can attack and avoid preferences permitted to the few favored creditors both under the New York statutes and the Bankruptcy Law (Stellwagen vs. Clum, 245 U. S., 605), but this enforcement of statutes invalidating preferences to favored creditors, cannot be relied upon as furnishing any sanction or authority for validating a preference to a small number of creditors, because of the avowed reason that insolvency or bankruptcy exists. This is the underlying reason for assuring to all creditors an equitable distribution and to defeat the carrying out of preferences which militate against the essential principles of

the equitable distribution which is the raison d'etre of Bankruptcy and Insolvency Laws.

State laws that attempt to foster a contrary re-result are suspended.

In Conklin vs. U. S. Shipbuilding Co., 136 Fed., 1006, insolvency proceedings were instituted against the U. S. Shipbuilding Co. The Court said at page 1007:

> "On June 30, 1903, this Court having adjudged the U. S. Shipbuilding Co. to be insolvent, appointed a receiver for it."

And the surety for the preference of contracts by the said Ship Building Company prayed for leave to present its claim in such proceedings. This application was denied. The Court said at page 1008:

> "Its (the surety company's) liability upon the bonds is a right of indemnity out of the assets of its principal, but until it has been damnified there is no basis upon which it can ask to be indemnified. Such is the clear rule of the bankruptcy law."

And the Court cited the cases of Riggin vs. Magwire, 15 Wall., 549, and Dunbar vs. Dunbar, 190 U. S., 340; and the opinion continued at page 1009:

> "The object of the bankruptcy act is to secure an equitable distribution of a bankrupt's estate. The proceedings in bankruptcy are largely equitable in their nature. Equitable

principles are applied. It sems, therefore, that the rules in bankruptcy proceedings, so far as they are applicable to the case now in hand, ought to be obeyed. Especially is this so, since the United States Shipbuilding Company was a manufacturing company * * * and, at any time within four months after this Court had put a receiver in charge of its property, might have been forced into involuntary bankruptcy under the authority of section 3a of the bankruptcy act as amended * * *. Had that course been pursued the provisions of the bankruptcy act concerning the character of claims provable against the insolvent company's estate would, without question, have had controlling authority."

8. The Bankruptcy Law, as construed and enforced by the Court of Bankruptcy, limits the liability of an indemnitor to the amount actually disbursed by the bankrupt indemnitee (In re Lathrop, Haskins & Co., 216 Fed., 102, at 107, citing cases).

There is no justification under the alleged sanction of a statute expressly applying to insolvency or bankruptcy only, to compel an indemnitor to pay his indemnitee more than has been paid out by such indemnitee.

The rule as to indemnity in insolvency proceedings is exactly the same as the rule in bankruptcy.

(Conkli nvs. U. S. Shipbuilding Co., 136 Fed., 1006;
Clinton vs. Koehm, 139 A. D., 73;

Travelers I. Co. vs. Moses, 63 N. J. Eq., 260;
Frye vs. Bath Co., 97 Me., 444;
Cushman vs. Carbondale Co., 122 Iowa, 656;
Brassil vs. Mo. Cas. Co., 147 App. Div., 815, aff'd.; 210 N. Y., 235;
Cornell vs. Trav. I. Co., 175 N. Y., 239;
Gilbert vs. Wiman, 1 N. Y., 550;
Carter vs. Aetna L. I. Co., 76 Kan., 275;
Allen vs. Aetna Co., 145 Fed., 881;
Thacher vs. Aetna A. & L. Co., 287 Fed., 484;
Goodman vs. Georgia Cas. Co., 189 Ala., 130;
Foley vs. U. S. Cas. Co., 113 Tenn., 592;
F. & C. Co. vs. Martin, 163 Ky., 12.

9. The estate of the bankrupt is depleted by the payment of the premium for the policy to wit $354 (Record, Page 50); and if the statute is enforced by making full payment to the particular creditor in this case, the general estate distributable to other tort creditors having judgments and to contract creditors will be first reduced by the payment of the expenses of administration, taxes, labor claims, and other claims preferred under the Bankruptcy Law, all of which will be paid out of the general fund without any contribution thereto by the particular creditor in this case. Whether the amounts thus charged to the distributable assets be large or small, the result will be the same, namely, the particular creditor in this case will be arbitrarily preferred without contributing to the expenses and charges against the general estate, even to the extent of a pro rata payment of the premium paid for the policy of insurance.

Eau Claire Bk v Jackman

10. Under the policy the insurance company is entitled to be subrogated to any claim which the assured may have against third parties (Scott vs. Curtis, 195 N. Y., 424; Lord & Taylor vs. Yale & Towne, 220 N. Y., at 135 foot; Casualty Co. vs. Swett Co., 230 N. Y., at 202, National Surety Co. vs. State Savings Bank, 156 Fed., 21), and in view of this fact it is impossible to uphold the statute as transmuting the policy into an agreement to indemnify for the benefit of some person other than the assured. In the case the right to subrogation in the right of the assured would be nullified.

To effect subrogation, the indemnitor is deemed to be a creditor.

II.

The fortuitious circumstance that Coron is insolvent or bankrupt, is the ground upon which an enlarged liability for the full amount of the policy has been imposed upon the defendant.

This is sought to be upheld by argument which

> "does not seem to rest upon any definite principle" (Burke case, 47 M., 173),

but may be summarized as follows:

The defendant is a corporation which may be regulated.

We submit, however, that this is not regulation. It is arbitrary imposition of liability. It is not an imposition of liability for one case, but for all cases—in other words in each and every policy written. It is not, for example, a command to build a grade crossing in a given case, the reasonableness of which can be determined, and which is an inherent and integral physical part of the

railroad and may be justified by the general public convenience as it touches the public character of railroads. It answers the description of an arbitrary command to surrender its land or to build a siding for the private benefit of the private party interested in the given case, which the Constitution forbids (Mo. Pac. Co. vs. Nebraska, 164 U. S., 403; Mo. Pac. R. Co. vs. Nebraska, 217 U. S., 196), or an arbitrary command to leave an upper berth in disuse if a private party is using the lower berth, which the Constitution forbids (C. M. S. P. Co. vs. Milwaukee, 238 U. S., 491), or a command to a railroad company in conducting its business to accept cars at an arbitrary connecting point merely to give a competing railroad the use of its terminal facilities (L. & W. R. Co. vs. Stockyard Co., 212 U. S., 132; or to compel the stopping of two trains at a small community, regardless of the unreasonable burden upon an interstate railway, which cannot be compelled (C. B. & Q. R. Co. vs. R. R. Com., 237 U. S., 220).

The reserved power to amend charters of incorporation does not permit taking property of corporations, except as an incidental, unavoidable and secondary and not unreasonably burdensome result of some greater purpose which justifies such taking because the public benefit so sereved far overweighs the incidental private loss. The liability in the instant case cannot be imposed upon the defendant on any such theory.

> Washington R.R. Co. vs. Fairchild, 224 U. S., 520.

If the sociological welfare of an injured individual can justify humane interest, nevertheless such considerations will not support a taking of defendant's property (Lord vs. Eq. L. A. S., 194

N. Y., 227, et seq., Cf. N. Y. L. I. Co. vs. Head, 234 U. S., 149, 166).

Notice must be taken at this point of the different liability imposed by the statute (Sec. 109, Ins. Law) from that contained in the contract of insurance, apart from such statute.

UNDER THE CONTRACT, ASIDE FROM THE STATUTE.

The money loss paid (which may be and usually is fixed by compromise) measures the amount of indemnity.

But where no money is paid by the insured,—what measures the indemnity? Shall we say, the full limit of the policy? If there have been two accidents covered by the policy and two judgments for $10,000 rendered against the insolvent, how does the court measure the liability of the defendant? Must the defendant pay each creditor the full amount of the policy? To ask this question would seem to answer it in the negative.

In the case of any large accident wherein for example 10 or 20 persons are killed, the owner of the vehicle may very likely be forced into bankruptcy. Applying the statute to an indemnity policy providing for a $10,000 limit for loss, the result will be to pay all such claims in full and contract creditors will be left to take their pro rata distribution in the bankruptcy proceedings. And, when the tort creditors have had a distribution of indemnity money, must general creditors resort to another distribution, out of which premiums for the indemnity insurance will be paid, in which indemnity money, general creditors have no claim, and out of which general fund all expenses, taxes, and labor, etc., claims are to be paid. This result is contrary to the underlying principle of the Acts of Congress which is to secure a pro rata distribution and to allow a discharge to a debtor

only upon condition that ALL OF his assets are given up to the bankruptcy court for this purpose. The state statute authorizing a different mode of treating insolvent estates must be deemd to be suspended.

For this reason the judgment based upon it cannot stand.

To compel defendant to pay a judgment upon such statute is taking property without due process of law.

III.

Furthermore, in its practical effect upon the hazard and burden of the insurance company, the statute guarantees compensation for loss to any person (to the limit of the policy) for injury suffered regardless of his lack of privity in the contract to which he contributes no part of the consideration or premium paid by the bankrupt or insolvent party, and in which he is not bound by any of the mutual obligations imposed upon the assured himself. The assured may be defeated for driving while intoxicated, but the stranger may be intoxicated, and a jury can find him free from contributory negligence and grant him a recovery. It will be said that this recovery will satisfy the requirements of the present statute in extending the liability under the policy to such injured party, despite his own intoxication.

And under the law of tort the liability would have to be borne by the insurance company if it were the tort feasor. We are, however, construing a contract, not determining liability for tort.

Insurance against accidents upon roads and streets is subject to some restraining control, in that reckless drivers may be refused insurance. But if a policy granted to a careful driver can be

extended to insure a stranger, no such safeguards against recklessness can be exercised. Juries are moved by sympathy for injured people in any case, even when knowledge that an insurance company is defending the case is not disclosed. But in a case directly against an insurance company brought by an injured party, experience shows that no influence can overbalance the sympathy of the jury for the injured party when combined with the knowledge that the money is to be paid by a corporation paid to insure,—even if we assume that the condition of the policy against liability to one driving while intoxicated cannot be lawfully extended to a stranger to the contract.

Juries will not discriminate in such a situation between a life insurance company insuring against death and an indemnity insurance company endeavoring to reimburse a named insured person.

In the instant case, if there has been life or endowment on other insurance collected for any amount,—even for as much or more than the indemnity insurance, no evidence of such fact is relevant or admissible in the action for reimbursement (Kellogg vs. N. Y. C. & C. Co., 79 N. Y., 72).

The result of this insurance of strangers by statute is to foster recklessness. And to say that recklessnes of the insured person is or may be equally increased, does not justify extending the protection of insurance to a greater number of other persons who are not subject to the obligations of the contract of insurance (Anderson case, 132 App. Div., at 188 and cases there cited), and who are no doubtful of the possibility of collecting insurance money which they did not pay for.

On the other hand, if it is desired that by legislation all persons shall be insured or compensated

for injuries wheresoever received, then the answer in the instant case is that no such legislation has been embodied in a statute. And when such statutory burden is offered as insurance, it will be a general burden imposed in all cases, and not limited to insurance companies, who happen to insure "insolvent or bankrupt" persons.

The defendant company has insured a person against whom, in the words of the statute

"insolvency or bankruptcy"

has been proved, or who has been already adjudged insolvent and at any time may be adjudged a bankrupt.

This is not a reasonable ground for discrimination against the defendant and amounts to a denial of the equal protection of the laws.

IV.

The classification cannot be upheld as affording "equal protection" because, any insurance company insuring any person against loss by accident, —and even insuring the insured person Coron,— is only obligated to indemnify him against the actual amount paid out by him, assuming him to be not insolvent or bankrupt. But the statute herein complained of, seeks merely by reason of insolvency or bankruptcy of certain insured persons to extend the obligation of the insurance companies in such cases.

Insolvent and bankrupt persons may apply for insurance, or persons having very small means

and likely to be put into bankruptcy upon the recovery of a judgment against them of $5,000 or more. Shall insurance companies refuse insurance to any but persons and companies having good financial standing? Such persons can aid in the defense of damage suits and can by prompt and extended efforts of paid servants, defeat and reduce and settle and compromise many claims which persons of small means cannot adequately defend. Because the expense of finding and producing disinterested witnesses, and of showing the real extent of injuries is often very large. Large and powerful insurance companies can discriminate between applicants for insurance, and need not accept as risks those who have not strong financial standing.

But the present statute obviously penalizes the insurer of insolvent and bankrupt persons.

The person not insolvent or bankrupt may pay part of the large amount usually claimed for injuries and be reimbured *pro tanto* by the indemnity insurance. But in the case of the insolvent or bankrupt person, the insurance company must arbitrarily pay th the full amount of the policy every time regardless of the measure of indemnity provided either (a) by contract; or (b) if the statute be upheld by the equitable rule of indemnity in bankruptcy insolvency. Premiums would have to be large enough to pay a total loss on many policies. But premiums and rates are uniform and if not fully compensatory in insolvency cases, the insurance company that insures persons of little means is discriminated against as an inevitable result of the larger burden imposed upon them under this statute.

The discrimination against policies written for insolvent or bankruptcy persons has no bearing upon any exercise of the police power (Buffalo vs. Chadeayune, 134 N. Y., 163; Freund, Police Power, pages 382, 419; Wolff Packing Co., vs. Ind. Court, 262, U. S., 522), but is a discrimination not supported by reason or justice (L. S. & M. S. Co. vs. Smith, 173 U. S., at 698).

V.

Also the statute as enforced in the judgment rendered enlarges the liability in any case of insolvency or bankruptcy of the assured, from that measured by a private contract of indemnity (French vs. ix, 143 N. Y., 90; Herendeen vs. Wilson, 82 Misc., 291, modified by striking out "upon the merits" in 161 App. Div., 910, aff'd, no opinion, 219 N. Y., 661; U. S. vs. C. A. Riffl Co., 247 Fed., 374) to that of a public contract (Pond vs. New Rochelle Co., 183 N. Y., 330; Smyth vs. N. Y. C. R. Co., 203 N. Y., 106; Rigney vs. N. Y. C. & C. Co., 217 N. Y., 31) and arbitrarily enlarges the burden of insurance which the defendant but for such statute is authorized to make as an insurance corporation, under the Laws of New York (Producers Co. vs. R. R. Com., 251 U. S., 228; Wash. Co. vs. Fairchild, 224 U. S., 530). This is an impairment of its right to exist and to do business as an indemnity insurance corporation which is not

> "consistent with the scope and objects of the corporation as it was originally constituted" (Mayor vs. 23rd St. Co., 113 N. Y., at 317; MacCracken vs. Hayward, 2 How., 606, 608);

or, in other words, an "impairment of the grant" of the right to be an insurance corporation and to issue policies for private indemnity. "Any law which enlarges, abridges, or in any manner changes the intention of the parties resulting from the stipulation in the contract necessarily impairs it" (Peo. vs. Otis, 90 N. Y., at 52; Story on the Constitution, Sec. 1385; MacCracken vs. Hayward, 2 How., 612).

Reserved power to revoke right to issue policies as for private indemnity in case of insolvent or bankrupt persons and to substitute permission to issue policies for the benefit of the public in such cases should not be inferred in absence of specific reservation (Owensboro vs. Cumberland Co., 230, U. S., 58). The statute arbitrarily changes every policy issued into a policy for public indemnification in case of "insolvency or bankruptcy" of the assured, who happens to receive a contract of insurance. This cannot be justified as "regulation" or "amendment" or "repeal," because it is an interference with

> "contracts with third persons" (Mayor vs. 23rd St. Co., 113 N. Y., at 317);

which aside from this statute, the defendant was authorized to make. The effect of the statute is to take property and the freedom to contract in a manner not consistent with the original purposes of the corporation.

> Un. P. Co. vs. Pub. Dev. Co., 248 U. S., 67;
> Lord vs. Eq. L. A. S. Co., 194 N. Y., at pages 227, et seq.;

Board of Ed. vs. Alliance I. Co., 159 Fed., 994;
C. M. & St. P. Co. vs. Wisconsin, 238 N. Y., 491;
Mac Cracken vs. Hayward, 2 How., 6066, 608;
Gunn vs. Barry, 15 Wall., 610;
Home I. Co. vs. Home I. Co., 20 Wall. 445;
And cf. N. Y. L. I. Co. vs. Head, 234 U. S., 149, 166.

Corporations must submit to the amendment or repeal of their charters in this state; but such right does not include arbitrary deprivation of property under the guise of regulation.

Stearns vs. Minn., 179 U. S., at 239-240;
Greenwood vs. Freight Ry., 105 U. S., at 23-24.

VI.

Indemnity insurance, unlike other insurance is not a business affected by any public interest (American Surety Co. vs. Shallenberger, 183 Fed., 636, and cases cited).

No restriction of the ordinary business of issuing indemnity insurance can be upheld upon the theory that the *business* is affected with a public interest.

No attempted valid restriction aside from the statute herein forbids the issuance of indemnity insurance to persons insolvent or bankrupt and compels the issuance in such cases of a policy obligating the insurance company to pay the full

amount of the policy to a stranger to the contract, regardless of indemnity. Legislative declaration of public interest does not determine the reasonableness of theregulation (Wolff Co. vs. Court, etc., U. S., 522).

POINT

II.

The statute cannot be upheld upon the theory that the party liable upon the original claim has supplied the indemnity. In the instant case the indemnitor must pay its own money in satisfaction of the indemnity policy. The indemnitor, therefore, is entitled to the benefit of the equitable rule applied in bankruptcy and insolevncy, that it should be called upon only to pay the amount actually disbursed by the assured indemnitee.

Bain vs. Atkins, 181 Mass., 240;
Embler vs. Hartford Ins. Co., 158 N. Y., 431;
Frye vs. Bath, 97 Me., 241;
Burke vs. London G. & A. Co., 47 Misc., 171 aff'd on opinion below, 126 App. Div., 933. and unanimously affirmed with costs without any opinion, 199 N. Y., 557;
Kinnan vs. Fid. Co., 107 Ill. App., 406;
Moses vs. Travelers I. Co., 63 N. J. Eq., 260.

In U. S. vs. United Surety Co., 192 Fed., 992, the substance of the decision was set forth in the syllabus as follows:

> "Where persons other than the contractor, for whom a surety company had executed a bond for the faithful performance of a contract with the United States for a public improvebent, executed a bond to indemnity the surety company against damages that it might suffer under the bond, but there was no privity in interest between the indemnitors and a creditor seking to avail himself of the benefit of the indemnity, the creditor was not entitled to enforce the same, especially as it appeared that the surety company having become insolvent had suffered no damage by reason of the execution of the bond."

In Hampton vs. Phipps, 108 U. S., 260, an agreement was made between two guarantors and suretees to indemnify each other against claims which they might be compelled to pay upon a certain agreement of guaranty. Creditors of the original debt brought the present action against the guarantors and claimed that the property which was the subject of the agreement betwen the indemnitors "enured to their benefit as securities for teh payment of the principal debt." The rule was recognized that property of the principal debtor pledged for the indemnification of the surety may be applied in equity for the benefit of his creditor, as against the guarantors of surety.

The Court said at page 264:

> "All this, it is to be observed, as the rule verbally requires, presupposes that the fund specifically pledged and sought to be primarily applied, is the property of the debtor,

primarily liable for the payment of the debt; and it is because it is so, that equity impresses upon it the trust, which requires that it shall be appropriated to the satisfaction of the creditor, the exoneration of the surety, and the discharge of the debtor. The implication, is, that a pledge made e xpressly to one, is in trust for another, because the relation betwen the parties is such, that that construction of the transaction best effectuates the express purpose for which it was made."

But it appeared that the guarantors were different persons from the original debtors and that they had pledged their own property for the purposes of the indemnity. The Court therefore held that such property could not even in equity be resorted to by the creditor. The Court sadi upon this point:

"It follows that the present case cannot be brought within either the terms or the reason of the rule; for, as the property, in respect to which the creditors assert a lien, was not the property of the principal debtor, and has never been expressly pledged to the payment of the debt, so no equitable construction can convert it by impilcation into a security for the creditor."

POINT

III.

The Supreme Court of the State of New York erred in holding that as a matter of law the assured person, Frank Coron, was insolvent or bankrupt; and also erred in denying a jury trial of any of the issues of fact, and in ordering summary judgment upon the complaint.

(Note: Under the circumstances in the present record, this question is reviewable. Huxoll vs. R. R. 247 U. S. 534; Prud. Ins. Co. vs. Check, 259 U. S., 530.)

I.

Although the defendant has shown that the judgment debtor Frank Coron has upwards of $2900 in personal property *with an income of* $100 *a week*, nothing was done upon execution or by garnishment to collect this money

The defendant-in-error stands upon his technical right under the Statute.

This circumstance shows that the statute is being used to work an inequitable result, and this, upon the professed ground of Frank Coron's alleged insolvency.

Instead of justifying the inference that Frank Coron is unable to pay the judgment herein, it is strongly suggested by the facts disclosed that the judgment or a considerable part of it could have been immediately collected upon the execution and the balance steadily collected by garnishment. The

inference to be drawn from the facts therefore, is not therefore, incontrovertible in supporting the finding that the execution was returned unsatisfied

"because of * * * insolvency or bankruptcy."

The execution was returned unsatisfied because no effort was made to satisfy it.

The judgment below was clearly erroneous in holding as a matter of law that the execution was returned and unsatisfied because of insolvency or bankruptcy; and for this reason alone, the judgment should be reversed.

The statute makes the showing an essential part of the burden upon one seeking to prove a statutory cause of action.

II.

The execution which was returned unsatisfied notwithstanding the property owned by the judgment-debtor must be deemed to be dormant; and subject to the rights of a trustee in bankruptcy as a creditor (Bankruptcy Law, Sec. 47, in re Monarch Acetylene Co., 229 Fed., 474, citing cases); and any money hereafter collected by the sheriff would pass to the trustee in bankruptcy (Clarke vs. Larremore, 188 U. S., 486) as well as any money collected by garnishment (In re Harper, 105 Fed., 900).

In Clarke vs. Larrimore, 188 U. S., 485, the judgment was affirmed.

Certain money collected by the Sheriff had been ordered to be paid to the Trustee in bankruptcy of the judgment debtor.

The judgment upon which the execution was levied was recovered within four months of the adjudication of bankruptcy. The judgment creditor claimed that the moneys collected upon the execution and still in the hands of the sheriff belonged to the judgment creditor. The Court said: page 488):

> "Doubtless as between the judgment creditor and debtor, and while the execution remained in force, the money could not be appropriated to the payment of his debts as against the rights of the judgment creditor, but it had not become the property absolutely of the creditor. The writ of exceution had not been wholly executed. Its command to the sheriff was to seize the property of the judgment debtor, sell it, and pay the proceeds over to the creditor. The time within which that was to be done had not elapsed, and the execution was still in his hands, not fulyl executed. The rights of the creditor were still subject to interception. * * * The bankruptcy proceedings operated in the same way. They took away the foundation upon which the rights of the creditor obtained by judgment, execution, levy, and sale, rested. The duty of the sheriff to pay the money over to the judgment creditor were gone and that money became the property of the bankrupt and was subject to the control of his representative in bankruptcy."

And at page 490:

> "It is enough now to hold that the bankruptcy proceedings seized upon the writ of

execution while it was still unexecuted and released the property which was held under it from the claim of the execution creditor."

IV.

IN CONCLUSION.

Judgment should be directed for the defendant by reason of the invalidity of Section 109 of the Insurance Law; or a new trial ordered.

In addition to the grounds already set forth, the manner in which this statute has been administered in the instant case and obviously is intended to be administered, its constitutionality is subject to review here (Sunday Lake I. Co. vs. Wakefield, 247 U. S., 350; Myles S. Co. vs. Iberia, 239 U. S., 478; Reagan vs. F. L. & T. Co., 154 U. S., 362).

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 223.

MERCHANTS MUTUAL AUTOMOBILE LIABILITY INSURANCE COMPANY, PLAINTIFF-IN-ERROR (DEFENDANT BELOW),

vs.

ABRAM B. SMART, DEFENDANT-IN-ERROR (PLAINTIFF BELOW).

BRIEF FOR DEFENDANT-IN-ERROR.

JOHN P. BRAMHALL,
Attorney for Defendant-in-Error.

733 TRANSPORTATION BUILDING,
WASHINGTON, D. C.

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BRIEF FOR DEFENDANT-IN-ERROR.

Statement.

A writ of error to review a final judgment of the Supreme Court of New York in the Appeal Division, Second Judicial Department thereof, entered May 18, 1923, and affirming a judgment entered against the plaintiff-in-error (defendant below), for the sum of $5,597.50, and from the orders upon which the said judgment was entered.

Summary judgment was ordered to be entered against the defendant upon a motion heard and determined upon a special term of said Supreme Court (see order pages 4-5, in

pursuance of Rule 113 of the New York Rules of civil practice).

Rule 113 of the New York Rules of Civil Practice provides that judgment may be ordered against the defendant in an action upon a judgment for a stated sum, "unless the defendant by affidavit or other proof shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to defend."

Facts.

The complaint alleged (complaint paragraph 1) record pages 7, 8, 9 and 10.

1. Upon information and belief that the defendant is a corporation organized and existing by virtue of the Insurance Laws of the State of New York, and at the time hereinafter mentioned was duly licensed to do business within the State of New York as an Insurance Corporation and authorized and empowered to issue policies of insurance to residents of the State of New York insuring them against loss or damage to any person and for which the person insured is liable.

2. Upon information and belief that heretofore and on and prior to the 17th day of November, 1919, one Frank Coron was the owner of a certain automobile truck and at the time aforesaid the said automobile carried the New York License Number 831,027—1919.

3. Upon information and belief that heretofore and prior to the 17th day of November, 1919, the defendant duly issued its policy of insurance to said Frank Coron, a resident of the State of New York, under and by virtue of the

terms of which the said defendant agreed to and did insure the said plaintiff from loss or damage to any person resulting from an accident, collision or otherwise being struck or hit by the said automobile truck of the said Frank Coron, and for which the said Frank Coron should be liable.

4. Upon information and belief that the said policy of insurance contained a provision that the said Frank Coron was insured only to the extent of $5,000.00 to any one person, together with interest and costs included in any judgment obtained against the said insured for injuries arising out of any such accident.

5. Upon information and belief that the said policy contained a further provision that the insolvency or bankruptcy of said Frank Coron, the person insured, should not release this defendant from the payment of damages for injuries sustained or loss encountered during the life of such policy, and that in case execution against the said insured be returned unsatisfied in an action brought by any such injured because of such insolvency or bankruptcy, that an action may be obtained by the injured person against the defendant under the terms of the said policy for the amount of the damage in said action not exceeding the amount of the said policy.

6. Upon information and belief that the said policy of insurance was in full force and effect upon the said 17th day of November, 1919.

7. That heretofore and on the said 17th day of November, 1919, the plaintiff was injured by the said automobile owned and operated by the said Frank Coron within the State of New York, and that the plaintiff brought an action against

said Frank Coron in the New York Supreme Court, Queens County, to recover the damages so suffered by the plaintiff by reason thereof, and on the 30th day of March, 1921, a judgment was duly rendered in favor of the plaintiff and against the said Frank Coron therein for $11,205.00, damages, and $149.05 costs, and on the said day duly entered in the Office of the Clerk of Queens County.

8. That thereafter and on or about the 5th day of April, 1921, a transcript of said judgment was duly filed and docketed in the Office of the Clerk of the County of Nassau that being the County in which the defendant Frank Coron then resided.

9. That on or about the 4th day of May, 1921, an execution against the property of the said Frank Coron was duly issued out of the Supreme Court, Queens County, to the Sheriff of the County of Nassau where the said Frank Coron then resided, and that the said sheriff thereafter returned the said execution wholly unsatisfied because of the insolvency of the said defendant, and the said judgment is wholly unpaid.

10. Upon information and belief, that the said Frank Coron on the said 5th day of April, 1921, was and ever since has been insolvent.

11. That no part of the said judgment has been paid.

12. That by reason of the aforesaid and in the Insurance Law of the State of New York there is now justly due and owing the plaintiff from the defendant the sum of $5,000.00 together with the sum of $149.05, plaintiff's costs as taxed, in all the sum of $5,149.05, with interest thereon from the

30th day of March, 1921, no part of which has been paid, although same has been duly demanded.

Wherefore, plaintiff demands judgment against the defendant for the sum of five thousand one hundred forty-nine and 5/100 ($5,149.05) dollars, with interest thereon from the 30th day of March, 1921, together with the costs and disbursements of this action.

This complaint is based upon Section 109, Insurance Laws of the State of New York, Birdseye, Cummings & Gilbert's Consolidated Laws of New York, volume 4, 2d edition. So much of said Act as is pertinent to this controversy is as follows:

> "Sec. 109. Standard Provisions for Policies Issued under the Provisions of Subdivision Three of Section Seventy.—On and after the first day of January, nineteen hundred and eighteen, no policy of insurance against loss or damage resulting from accident to or injury suffered by an employee or other person and for which the person insured is liable, or against loss or damage to property caused by horses or by any vehicle drawn, propelled, or operated by any motive power, and for which loss or damage the person insured is liable, shall be issued or delivered to any person in this state by any corporation authorized under subdivision three of section seventy of this chapter, or, if a foreign corporation, authorized to do business in this state, unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insured carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy, and stating that in case execution against the insured is returned unsatisfied in an action brought by the injured, or his or her personal representative

in case of death results from the accident, because of such insolvency or bankruptcy, that then, an action may be maintained by the injured person, or his or her personal representative, against such corporation under the terms of the policy for the amount of the judgment in the said action not exceeding the amount of the policy.

"Sec. 2. This act shall take effect immediately."

(L. 1909, ch. 33, Sec. 109, as added by L. 1917, ch. 524, amended.)

This Act became a law April 10, 1918, with the approval of the Governor, passed, three-fifths being present.

The above provision of the statutes of the State of New York was endorsed upon the policy issued by the plaintiff-in-error, and was in full force and effect for a period of twelve months, beginning at noon on the 16th day of August, 1919, and ending at noon on the 16th day of August, 1920, standard time, at assured's address hereinafter set forth.

That on the 17th day of November, 1919, one Frank Coron, the assured under the terms of said policy, which was in full force and effect at that time, was the owner of said automobile truck, and at the time aforesaid said automobile carried New York license number 831027, 1919.

That on said 17th day of November, 1919, the plaintiff was injured by the said automobile owned and operated by the said Frank Coron within the State of New York, and that the defendant-in-error brought an action against said Frank Coron in the Supreme Court, Queens County, to recover damages so suffered by the plaintiff by reason thereof, and on the 30th day of March, 1921, a judgment was duly entered in favor of the plaintiff and against the said Frank Coron therein for $11,205 damages, and $149.05 costs, and on said day duly entered in the office of the clerk of Queens County.

That thereafter and on the 5th day of April, 1921, a transcript of said judgment was duly filed and docketed in the office of the clerk of the County of Nassau, that being the county in which the defendant Frank Coron then resided; that on or about the 4th day of May, 1921, an execution against the property of said Frank Coron was duly issued out of the Supreme Court, Queens County, to the sheriff of the County of Nassau where the said Frank Coron then resided, and that said sheriff thereafter returned the said execution wholly unsatisfied because of the insolvency of said defendant, and the said judgment is wholly unpaid; that no part of said judgment has ever been paid; that thereafter an examination in supplemental proceedings was had which showed that Frank Coron was insolvent within the meaning of the provisions of Section 109 above referred to (record, page 22). The statutes of the State of New York with reference to the question of insolvency, as referred to in said Section 109, is as follows:

> "In case execution against the insured is returned unsatisfied * * * because of such insolvency or bankruptcy that then an action may be maintained by the injured person. * * *"

Points and Authorities.

This controversy resolves itself into a determination as to whether or not the State of New York under its Constitution can pass laws regulating insurance corporations, and fixing by statute the basis of the policies to be issued by such insurance corporations, and whether or not insurance corporations operating in the State of New York are required to

comply with the Legislative mandates of said State respecting the contracts embodied in the policies of insurance to be issued by said companies to the citizens of the State of New York.

At the outset it seems desirable to call the court's attention to the construction placed upon Section 109 of the statutes of the State of New York, above referred to by the courts of said State. In the case of Etta Roth, Respondent, *vs.* National Automobile Mutual Casualty Company, Appellant, decided July 4, 1922, which was a suit against the defendant based upon said Section 109 of the New York Insurance Laws (202 N. Y. App., pp. 667-674), Justice Greenbaum, speaking for the court, says in reference to said section:

> "The Legislature must, however, have had some cogent reasons for enacting section 109 of the Insurance Law. Plaintiff in its brief quotes from the appellant's brief, submitted to the Appellate Term, and to which he referred upon the oral argument before us without any suggestion on the part of the defendant's counsel that he had been incorrectly quoted, as follows: 'The writer is reliably informed that section 109 was added to the Insurance Law on the advice of the present State Superintendent of Insurance and that it was never its intention to change the nature of a liability policy to one other than an indemnity policy and that the section was added, in order to eliminate evil, which was becoming a general practice among insurance companies, *i. e.*, the practice on the part of insurance companies with assureds, who were liable to pay a substantial amount for an injury sustained, to put the assured through bankruptcy, thereby precluding a recovery on the part of the injured by reason of the fact that an execution against

the assured would be returned unsatisfied and the company then standing on a technical construction of the policy could claim, that, since it was an indemnity policy for loss occasioned to the assured, the assured having sustained no loss, there was nothing which the company could legally be called upon to pay.'

"If such were the reasons which moved the Legislature to enact section 109 of the Insurance Law, and if insurance companies heretofore indulged in the practice of colluding with policy holders to put them through bankruptcy in consideration of escaping liability under their policies, it would not be unreasonable to assume that they might not hesitate to escape liability to an injured person under the act by colluding with the assured after an accident by procuring him to do some act forbidden by the policy or to omit to do some act which he was obliged to do. It would thus be incumbent upon the court to scrutinize with great care any defense in a case like this, which is based upon the non-observance on the part of the assured of what may be called conditions subsequent, such as the plea of non-co-operation here urged."

In the case of Bridget O'Connell, Administratrix of Patrick O'Connell, deceased, Respondent, *vs.* New Jersey Fidelity and Plate Glass Insurance Company, Appellant, Appellate Division, Supreme Court of New York, page 117, respecting Section 109 of the Insurance Laws of the State of New York, Kelly, Judge, says:

"The defendant does not press its objection as to the constitutionality of Section 109 of the Insurance Law. It claims it is unconstitutional only when it is against its pocket book, but when things are coming its way, under the law, it is constitutional."

In the case of Samuel Schoenfeld, Respondent, *vs.* New Jersey Fidelity and Plate Glass Insurance Company, Appellant, Appellate Division, Court of Appeals of New York. Advance Sheets, Law Reports, Session Laws of the State of New York, No. 1156, dated February 24, 1923, page 796, Judge Young in passing on the question involved in this case said:

> "I think it must be conceded that as between the assured and the Insurance Company failure by the assured to comply with the condition of the policy requiring co-operation would prevent his recovery under the policy of the amount of the judgment being paid by him. I can see nothing in the statute showing legislative intent to deprive the company of its defense or to create any other or different liability to the insured party than that which the policy gave the assured. On the contrary, the intention was that at the time when a right of action accrued to the injured party under the provision of Section 109 of the Insurance Law to justify a recovery from the company upon the judgment, the policy must then be in force. It is clear from the language of that section that the liability of the company to the insured party does not accrue until an execution issued upon the judgment obtained against the assured has been returned unsatisfied by reason of insolvency or bankruptcy. Insolvency or bankruptcy is a test upon which the right of action depends and the time of the insolvency or bankruptcy is to be determined when the execution is returned unsatisfied."

It has long since been determined by this Honorable Court that the interpretation of a State statute by the State courts with respect to its application to policies of insurance

issued by a foreign insurance company is binding on the Supreme Court of the United States and the same rule applies with respect to the interpretation of a State statute as applied to domestic insurance corporations. In the case of New York Life Insurance Company, Plaintiff-in-Error, *vs.* Fannie Cravens, 178 U. S., 389, Justice McKenna in delivering the opinion of the Court (quoting the opinion of the Supreme Court of the State of Missouri), said:

> "Foreign insurance companies who do business in this State do so not by right but by grace and must in so doing conform to its laws. They cannot avail themselves of its benefits without bearing its burdens. Moreover, the State may prescribe conditions upon which it will permit foreign insurance companies to transact business within its borders or exclude them altogether, and in so doing violates contractual rights of the company."
>
> Citing State *vs.* Stone, 118 Missouri, 388; Daggs *vs.* Orient, Missouri, 136 Missouri, 382.

> "It is well settled that the Legislature of the State has the power to pass laws regulating and prescribing rules by which foreign insurance companies may do business in this State and prohibit them from doing so altogether if inclined."
>
> Paul *vs.* Virginia, 8 Wall., 168, 19 L. Ed., 357; Hooper *vs.* California, 155 U. S., 648.

> "It logically follows that in passing the section of the statute quoted the Legislature did not exceed the powers conferred upon it by the State Constitution and that such legislation is not in conflict with any provisions of the Constitution of the United States."
>
> "From the Missouri law as thus established may the Plaintiff-in-Error claim exemption by virtue of

> the Constitution of the United States? What the powers of the corporation are in relation to the State of its creation, what the powers of the corporation are in relation to a State where it is permitted to do business are declared early in the existence of this Court and has been repeated many times since. What those powers are we take occasion to repeat in Waters Pierce Oil Company *vs.* Texas, 177 U. S., 28."

A corporation is the creature of the law and none of its powers are original. They are precisely what the incorporating act has made them and can only be exerted in the manner in which that act authorizes.

In other words, the State prescribes the purpose of a corporation and the means of executing these purposes. Purposes and means are within the State's control. This is true as to domestic corporations. It has even a broader application to foreign corporations.

> "It follows that the insertion in the policy of a provision for a different rule of commutation from that prescribed by the statute in case of default of payment of premium after three premiums have been paid as well as the insertion in the application of a clause by which the beneficiary purports to waive and relinquish all rights or claim to any other surrender value than that so provided whether required by a statute of any State or not, is an effectual attempt to evade and nullify the clear words of the statute."

This case grew out of an attempt on the part of the New York Life Insurance Company to evade the statutes of the State of Missouri by writing into the application that the right of the assured with reference to the payment of

premiums and the forfeiture of the policy should be controlled by the laws of the State of New York, which was the home office of the insurance company. The laws of the State of Missouri provided for a non-forfeiture clause and the Supreme Court of the State of Missouri held that the non-forfeiture clause passed by the Legislature of the State of Missouri controlled the terms of the policy and any other provisions injected into the policy by the Life Insurance Company were void. This decision by the Supreme Court of Missouri was sustained in the above quoted opinion.

In the case of Orient Insurance Company of Hartford, Conn., *vs.* Daggs, 172 U. S., 552, which reached the Supreme Court of the United States precisely as the case at bar raised the constitutionality of the Valued Policy Act passed by the Legislature of the State of Missouri and this Honorable Court in passing on this question, Justice McKenna delivering the opinion, said:

> "The statute of Missouri is alleged to violate the Fourteenth Amendment of the Constitution of the United States in the following particulars:
>
> (1) that it abridges privileges and immunities of citizens of the United States;
>
> (2) denies to persons within its jurisdiction the equal protection of the laws, and,
>
> (3) deprives persons of property without due process of law."

First, it is not clear that this ground is relied upon. It is, however, not available to Plaintiff-in-Error. A corporation is not a citizen within the meaning of the provision and hence has not privileges and immunities secured

to citizens against State legislation. This was decided in Paul *vs.* Virginia, 8 Wall., 168, against a corporation upon which were imposed conditions for doing business in the State of Virginia, and has been repeated in many cases since, including one at the present term, Blake *vs.* McClunz, 172 U. S., 239.

Second. It is not easy to make a succinct statement of the objections of Plaintiff-in-Error under this provision. Counsel says:

> "The business of insurance includes insurance against damages on account of death, accident, personal injury, liability for acts of employees, damages to plate glass, damages by hail, lightning, high wind, tornadoes, and against damages to personal property on account of fire or other casualty, by other elements, as well as insurance against loss by damage to buildings on account of fire.
>
> "No other business is subject to the discrimination in cases of such business involved in litigation of having damages assessed without due process of law. The statute singles out persons engaged in fire insurance as against all other kinds of insurance and as against all other kinds of business and moves the onerous and unusual condition provided in the statute against such persons."

The Court in disposing of this case held that a Valued Policy Law of a State is not unconstitutional as denying the persons within the jurisdiction the protection of its laws because it applies only to the business of fire insurance companies. The Valued Policy Statute which applies only to future contracts cannot be said to deprive an insurance company of its property without due process of law by raising a

conclusive presumption of fact as to the value of the property in actions on such policies, as the parties are free to fix such value for themselves by their contract and the statute operates merely by way of estoppel after the contract is made. The statute of Missouri (Revised Statutes, 1889, Sections 5897 and 5898) which provides that—

> "In all suits brought upon the policies of insurance against loss or damages by fire heretofore issued or renewed the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issue of the policy the full amount insured therein on said property and in case of total loss of the property insured the measure of damages shall be the amount for which the same was insured."

less the depreciation in value below that amount since the policy was issued and also making illegal any condition in the policy to the contrary is within the ultimate powers of the State in regulating the business of corporations created by its laws or of foreign corporations permitted to do business therein. The power of a State to impose conditions on foreign corporations doing business therein is as extensive as its powers over domestic corporations.

The question of the right of State legislatures to impose obligations and restrictions upon corporations, either domestic or foreign, doing business within such State, was fully discussed by this Court in the case of Waters Pierce Oil Company, Plaintiff-in-Error, *vs.* State of Texas, 177 U. S., 28.

In conclusion it is suffice to say that it has been repeatedly held by this Honorable Court, as above cited, that the interpretation of a State statute by the State Court in reference

to application to policies issued by insurance companies is binding on the Supreme Court of the United States. In the instant case the highest court of the State of New York has held that Section 109 of the Insurance Laws of the State of New York was constitutional and did not in any way deprive the insurance company of their property without due process of law. The Plaintiff-in-Error issued the policy which is the basis of this case, receiving the premium thereon and thereby placed itself within the provisions of Section 109 above referred to and must be bound by the provisions of said act. Plaintiff-in-Error's prayer for relief should be denied.

Respectfully submitted,

JOHN P. BRAMHALL,
Attorney for Defendant-in-Error.

733-34 TRANSPORTATION BUILDING,
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(5285)

Cud.

MERCHANTS MUTUAL AUTOMOBILE LIABILITY INSURANCE COMPANY *v.* SMART.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 223. Argued January 22, 1925.—Decided March 2, 1925.

A state law (N. Y. Laws 1918, c. 182) required that any policy issued by an insurance corporation, in the future, to indemnify the owner of a motor vehicle against liability to persons injured through negligence in its operation, shall provide that the insolvency or bankruptcy of the insured shall not release the company

from payment of damages for an injury sustained during the life of the policy, and that, in case execution against the insured in an action brought by a person so injured shall be returned unsatisfied because of such insolvency or bankruptcy, the injured person may maintain an action against the company on the policy for the amount of the judgment not exceeding the amount of the policy. *Held:*

(1) That the regulation is reasonable, and within the police power; it cannot be said to deprive the Insurance Company of property without due process of law. P. 129.

(2) That it does not conflict with the Bankruptcy Act by providing for an unlawful preference. P. 130.

198 N. Y. S. 949 affirmed.

ERROR to a judgment of the Supreme Court of New York, Appellate Division, affirming a judgment recovered by Smart against the Insurance Company. The New York Court of Appeals declined to review. The facts are given in the opinion.

Mr. Anthony J. Ernest, with whom *Mr. Frederick J. Stone* was on the brief, for plaintiff in error.

Mr. John P. Bramhall for defendant in error.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

The Merchants Mutual Automobile Liability Insurance Company, the plaintiff in error, is a New York corporation authorized to insure against recoveries of damages by persons injured by automobiles and other vehicles, for whose operation the insured is responsible. It issued a policy August 16, 1919, to Frank Coron, thus to indemnify him in the operation of his automobile truck to the extent of $5,000, together with interest and costs. The policy contained a provision, inserted pursuant to the requirement of Section 109 of the Insurance Laws of New York. (Laws of 1918, ch. 182.) The section reads as follows:

"On and after the first day of January, nineteen hundred and eighteen, no policy of insurance against loss

or damage resulting from accident to or injury suffered by an employee or other person and for which the person insured is liable, or, against loss or damage to property caused by horses or by any vehicle drawn, propelled or operated by any motive power, and for which loss or damage the person insured is liable, shall be issued or delivered to any person in this state by any corporation authorized . . . to do business in this state, unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy, and stating that in case execution against the insured is returned unsatisfied in an action brought by the injured, or his or her personal representative in case death results from the accident, because of such insolvency or bankruptcy, that then an action may be maintained by the injured person, or his or her personal representative, against such corporation under the terms of the policy for the amount of the judgment in the said action not exceeding the amount of the policy."

Smart was injured by the truck of Coron. He brought suit against Coron for damages and recovered a judgment for $11,000. He issued execution against Coron upon the judgment, which was returned unsatisfied, and supplemental proceedings were undertaken against him without success.

The Supreme Court of the State held that on the record Coron was insolvent, that under the clause of the policy embodying the provision of Section 109 the action lay, and because of a failure to set up any good defense, a summary judgment was entered for $5,000 and interest and costs in favor of Smart against the Company.

The case has been brought here by the Company under Section 237 of the Judicial Code, upon the claim that Section 109 is invalid, first in that it deprives the Insur-

ance Company of its property without due process of law, and, second, because it is in conflict with the bankruptcy laws of the United States. It is well settled that the business of insurance is of such a peculiar character, affects so many people and is so intimately connected with the common good that the State creating insurance corporations and giving them authority to engage in that business may, without transcending the limits of legislative power, regulate their affairs so far at least as to prevent them from committing wrongs or injustice in the exercise of their corporate functions. *Northwestern Life Insurance Company* v. *Riggs*, 203 U. S. 243, 254; *Whitfield* v. *Aetna Life Insurance Company*, 205 U. S. 489; *German Alliance Insurance Company* v. *Kansas*, 233 U. S. 389, 412, *et seq.*; *La Tourette* v. *McMaster*, 248 U. S. 465, 467; *National Insurance Company* v. *Wanberg*, 260 U. S. 71, 73. Such regulation would seem to be peculiarly applicable to that form of insurance which has come into very wide use of late years, that of indemnifying the owners of vehicles against losses due to the negligence of themselves or their servants in their operation and use. The agencies for the promotion of comfort and speed in the streets are so many and present such possibility of accident and injury to members of the public that the owners have recourse to insurance to relieve them from the risk of heavy recoveries they run in entrusting these more or less dangerous instruments to the care of their agents. Having in mind the sense of immunity of the owner protected by the insurance and the possible danger of a less degree of care due to that immunity, it would seem to be a reasonable provision by the State in the interest of the public, whose lives and limbs are exposed, to require that the owner in the contract indemnifying him against any recovery from him should stipulate with the insurance company that the indemnity by which he

saves himself should certainly inure to the benefit of the person who thereafter is injured. Section 109 does not go quite so far. It provides that the subrogation shall take place only when the insured proves insolvent or bankrupt, and leaves the injured person to pursue his judgment against the insured if solvent without reliance on the policy.

Another reason for the legislation is suggested in the opinion of the Appellate Division of the Supreme Court of New York (*Roth* v. *National Automobile Mutual Casualty Company*, 202 N. Y. App. Div. 667, 674), to wit, that it was enacted on the recommendation of the State Superintendent of Insurance to make impossible a practice of some companies to collude with the insured after an injury foreshadowing heavy damages had occurred, and to secure an adjudication of the insured in bankruptcy whereby recovery on the policy could be defeated because the bankrupt had sustained no loss.

Whatever the especial occasion for the enactment, it is clear that the exercise of the police power in passing it was reasonable and can not be said to deprive the Insurance Company of property without due process of law. It is to be remembered that the assumption of liability by the Insurance Company under Section 109 is entirely voluntary. It need not engage in such insurance if it chooses not to do so.

The second objection is that the policy in this clause makes provision for an unlawful preference under the National Bankruptcy Act, when the owner who is indemnified is a bankrupt at the time of the injury.

Passing by the difficulty that suggests itself that the Insurance Company is not one of the creditors of the insolvent insured and so is hardly in position to question the validity of the law for a defect of this kind (*Heald* v. *District of Columbia*, 259 U. S. 114, 123, and cases cited), we prefer to deal with the objection on its merits. It has

no substance. As we have already suggested, the legislature might have required that policies of this kind should subrogate one injured and recovering judgment against the assured to the right of the latter to sue the company on the policy. It simply would create a secured interest in the recovery on the policy for the benefit of the injured person when ascertained. It would not be an unlawful preference any more than security given for any lawful claim against the assured while solvent would be unlawful in the event of subsequent bankruptcy. The clause we have before us is just the same save in one respect. It secures to the injured person the indemnity which his injurer has provided for himself in advance to avoid payment for the injury. But the clause becomes operative only in the event of the insolvency or bankruptcy of the assured when he can no longer use the indemnity to pay the injured person as he should. The title to the indemnity passes out of the bankrupt or insolvent person and vests in him in whom the contract and the state law declares it should vest. The assured is divested by the terms of the instrument under which the interest of the assured and the interest of the injured, then contingent, and now absolute, were created. The general creditors have lost nothing because by the fact of bankruptcy the interest of the assured in the policy passed to the injured person and did not become assets of the assured. The provision for the divesting of the interest on bankruptcy was not made to defraud creditors or in expectation of bankruptcy, but was made so far as we can know when the assured was solvent and merely to provide against a future contingency.

We think that there is in this state legislation complained of, no conflict with the policy or the letter of the bankrupt law.

A third objection is made that there was no sufficient evidence that the insured was insolvent. This was a

question of fact under the proceedings which were instituted by execution and what followed. The state courts have found it to exist and it is not for us to question their findings.

The judgment is

Affirmed.